# Petition

81-1074

No.

Office-Supreme Court, U.S.
FILED
DEC - 8 1981
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, and DENNIS P. McCARTHY,
Special Agent, Internal Revenue Service,
*Respondents,*

vs.

JAMES F. FORD,
*Respondent,*

MIDWEST GROWERS COOPERATIVE, JAMES CARDWELL,
MARVIN MARTIN, COAST EXPRESS, INC.,
WEST COAST SYSTEMS, and INTERSTATE CARRIERS, INC.,
*Petitioners.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

E. O. C. ORD
COUNSEL OF RECORD
KEVIN W. FINCK

E. O. C. ORD, INCORPORATED
425 California St., Suite 1700
San Francisco, CA 94104
Telephone: (415) 433-0303
*On behalf of the Attorneys and Petitioners above named*

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTIONS PRESENTED

1. The petitioners should have been granted intervention under the decisional authority of this Court, because:

(a) The district court found that the unimpeached, verified moving papers seeking intervention showed that the issuance of the IRS summons was made for an improper purpose.

(b) Valid constitutional issues were raised.

2. Since 42 U.S.C. § 1988 provides that attorney's fees can only be awarded to a party, the Court of Appeals had to determine whether the district court erroneously denied the appellants motion for intervention before it could resolve the attorney's fees issue.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | i |
| Statutes involved | 2 |
| Statement of the case | 5 |
| A. The parties and the proceedings below | 5 |
| B. The District Court's Opinion | 7 |
| C. The Opinion of the Court of Appeals | 8 |
| Reasons for granting the writ | 10 |
| I | |
| The petitioners should have been granted intervention under the decisional authority of this court, because: | 13 |
| A. The District Court found that the unimpeached, verified moving papers seeking intervention showed that the issuance of the IRS summons was made for an improper purpose | 13 |
| B. Valid constitutional issues were raised | 14 |
| II | |
| Since 42 U.S.C. § 1988 provides that attorney's fees can only be awarded to a party, the Court of Appeals had to determine whether the District Court erroneously denied the appellants' motion for intervention before it could resolve the attorney's fees issue | 17 |
| Conclusion | 24 |
| Appendices | A-1 |

## TABLE OF AUTHORITIES CITED

### Cases


Page

Alfonso v. United States, 613 F.2d 1309 (5th Cir., 1980) ..... 24

Allman v. Potts, 371 P.2d 11 (1962) ..... 22

Application of Dr. J. W. Schonfeld, Ltd., 460 F.Supp. 332 (E.D. Va. 1978) ..... 17

Califano v. Sanders, 430 U.S. 99 (1977) ..... 17

Cardwell et al. v. Kurtz et al., No. 78 0257 MML (C.D. CA, 1979) ..... 8

Chicago Police Officers Association v. Stover, 624 F.2d 127 (10th Cir., 1980) ..... 20

Chris-Craft Industries, Inc. v. Monsanto Co., 59 F.R.D. 282 (C.D. Cal., 1973) ..... 24

City of San Diego v. Andrews, 195 Cal. 111 (1924) ..... 22

Corpus v. Estelle, 605 F.2d 175 (5th Cir., 1979) ..... 23

Coyote v. Roberts, 27 Crim.L.Rptr. 2382 (Jan. 28, 1981) ..... 20

Davis v. Passman, 99 S.Ct. 2264 (1979) ..... 16

Donaldson v. United States, 400 U.S. 517 (1971) ..... 10, 13, 16, 17

Franks v. Delaware, 438 U.S. 154 at 170 (1978) ..... 16

Hutto v. Finney, 437 U.S. 678 (1978) ..... 22

Klotz v. United States, 602 F.2d 920 (9th Cir., 1979) ..... 9, 21

Larchmont Engineering, Inc. v. Toggenburg Ski Center, Inc., 444 F.2d 490 (2nd Cir., 1971) ..... 24

Maher v. Gagne, 100 S.Ct. 2570 (1980) ..... 20

Midwest Growers v. Kirkimo, 533 F.2d 455 (CA 1976) 15

Powell v. United States, 400 U.S. 48, pp. 57-58 (1964) 13

Resier v. Del Monte Properties Co., 605 F.2d 1135 (9th Cir. 1979) ..... 18

Reisman v. Caplin, 375 U.S. 440 (1964) ..... 10, 13, 14, 15, 18

Robinson v. Kinbrough, 620 F.2d 468 (5th Cir. 1980) ..... 23

## Table of Authorities Cited

### Cases


| | Page |
|---|---|
| Schmidt v. Zazzara, 544 F.2d 412 (9th Cir., 1976) | 18 |
| Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir., 1979) | 23 |
| United States v. Church of Scientology, 520 F.2d 818 (9th Cir., 1975) | 6 |
| United States v. La Salle National Bank, 437 U.S. 298 (1978) fns. 19 & 20 | 12, 15, 16, 19, 22 |
| United States v. Zack, 521 F.2d 1366 (9th Cir., 1976) | 12 |
| Wainwright Industries, Inc. v. Wall Street Transcript, 80 F.R.D. 103 (S.D.N.Y., 1978) | 20 |


### Statutes and Rules


| | |
|---|---|
| Civil Rights Attorney's Award Act of 1976 | 19 |
| Equal Access to Justice Act (Oct., 1981) | 11 |
| Tax Reform Act of 1976 | 10 |
| United States Codes: | |
| 5 U.S.C. Section 504 | 2, 23 |
| 18 U.S. Section 371 | 12 |
| 26 U.S.C. Section 7602 | 2, 10, 12, 13 |
| Section 7604 | 3 |
| Section 7609 | 3, 7, 10 |
| 28 U.S.C. Section 1254(1) | 2 |
| Section 1331 | 4 |
| Section 1331(a) | 12, 16, 17 |
| 42 U.S.C. Section 1988 | passim |


### Constitution


| | |
|---|---|
| United States Constitution: | |
| First, Fourth, Fifth and Ninth Amendments | 16 |

TABLE OF AUTHORITIES CITED

**Other Authorities**


| | Page |
|---|---|
| 122 Cong. Rec. #35118 (Oct. 1, 1976) | 12 |
| House Report No. 1656, 94th Cong. & Admin. News, 6121, 6124 | 17 |
| S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5912 | 20 |
| Report of the Committee of Finance, United States Senate on H.R. 10612, 940938, p. 368 | 10 |
| 7 West Federal Practice Manual § 8831, p. 44 | 22 |
| 1976 U.S. Code, Cong. and Admin. News, p. 2912, fn. 4 | 22 |
| 1976 U.S. Code, Cong. & Admin. News, at 5913 | 12 |

No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, and DENNIS P. McCARTHY,
Special Agent, Internal Revenue Service,
*Respondents,*

vs.

JAMES F. FORD,
*Respondent,*

MIDWEST GROWERS COOPERATIVE, JAMES CARDWELL,
MARVIN MARTIN, COAST EXPRESS, INC.,
WEST COAST SYSTEMS, and INTERSTATE CARRIERS, INC.,
*Petitioners.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *United States v. James Ford, et al.*, No. 79-3194 below.

## OPINIONS BELOW

The District Court opinion was unpublished.

The opinion of the Court of Appeals has not yet been officially reported. The opinion has been published in 81-2 USTC ¶ 9572.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 17, 1981. A timely petition for rehearing was denied on September 9, 1981. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

### 5 U.S.C. Section 504

5 U.S.C. Section 504. Costs and fees of parties

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust. . . .

### 26 U.S.C. Section 7602

26 U.S.C. Section 7602. Examination of books and witnesses

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to

the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. Section 7609

(a) Notice.—

(1) In general.—If—

(A) Any summons described in subsection (c) is served on any person who is a third-party record-keeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons.

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2). . . .

(b) Right to intervene; right to stay compliance.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

## 28 U.S.C. Section 1331

**28 U.S.C. Section 1331. Federal question**

**The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.**

## 42 U.S.C. Section 1988

**The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.**

## STATEMENT OF THE CASE

### A. The Parties and the Proceedings Below

As part of his investigation into the income tax liability of petitioner Midwest Growers Cooperative, respondent Special Agent Dennis P. McCarthy of the Internal Revenue Service issued an Internal Revenue summons to respondent James F. Ford. The summons called for Mr. Ford's testimony concerning checks issued by Midwest Growers Cooperative and negotiated through Desert GMC, Inc., a corporation of which Mr. Ford is president. Mr. Ford refused to comply with the summons and, on August 16, 1978, the United States and Agent McCarthy petitioned the district court for enforcement of the summons.

On August 22, 1978, the district court entered an order directing Mr. Ford to appear before the Magistrate on October 16, 1978, and show cause why the summons should not be enforced. The date of the hearing was later extended by the court to October 20, 1978.

On October 23, 1978, the district court entered an order allowing petitioners to file a petition for intervention. On November 28, 1978, petitioners filed a motion to intervene in the summons enforcement proceeding. The district court entered its memorandum decision and order denying the motion to intervene on February 13, 1979. On February 27, 1979, the district court scheduled a March 7, 1979, hearing to enforce the Ford summons. On March 6, 1979, the matter was rescheduled to be heard on March 23, 1979.

On March 16, 1979, petitioners filed a motion for reconsideration of the denial of intervention, a motion for a stay of all proceedings pending the reconsideration motion, and a motion for stay pending appeal. Due to the inaction of the district court on these motions, petitioners had to file a notice of appeal from the district court's February 13 judgment denying intervention well before the court ruled on petitioner's March 16 motions for reconsideration and

a stay. The notice of appeal was filed on April 13, 1979. On April 27, 1979, the district court denied all of petitioner's March 16, 1979 motions.

On June 19, 1979, the United States Magistrate for the District of Nevada heard the petition to enforce the summons. On July 18, 1979, the Magistrate filed an amended report and recommendation, recommending that the petition be enforced. Counsel for Mr. Ford filed an application for judicial reconsideration which was ruled upon on October 23, 1979. The District Court Judge found under *United States v. Church of Scientology*, 520 F.2d 818 (9th Cir., 1975) that Mr. Ford had "presented evidence sufficient to raise the possibility that the Internal Revenue Service is conducting this summons enforcement proceeding in bad faith or for an improper purpose," ordered discovery and remanded the matter to the Magistrate for further proceedings. (See Appendix A)

A subpena duces tecum was issued against Special Agent McCarthy (one of the respondents in this petition), requesting certain Government files on December 28, 1979. The Government did not file any objections or request a protective order. On the given day, Mr. McCarthy showed up, but without the subpenaed documents. Mr. Ford's attorneys then filed a motion for the production of documents on March 5, 1980. The Government responded by obtaining a stay of the proceedings from the district court and moved to dismiss their petition to enforce the summons on March 28, 1980. The petitioners filed an application to reply to the Government's motion to dismiss as amicus curiae or in other status and requested the award of attorney's fees on April 14, 1980. The district court denied the petitioners' application. Mr. Ford also objected to the motion to dismiss claiming that a dismissal order would prejudice his ability to show bad faith, harassment and investigative misconduct, and moved for the award of attorney's fees pursuant to 42 U.S.C. § 1988. Although the district court

granted the dismissal of the summons enforcement suit it awarded Mr. Ford attorney's fees of $23,431.25 in its May 12, 1980 decision. (See Appendix B) The appropriateness of the amount of the award of attorney's fees is still being litigated in the district court.

**B. The District Court's Opinion**

In his February 9, 1979 Memorandum Decision and Order, Judge Claiborne denied the petitioners' motion for intervention. (See Appendix C) The Court noted that "[t]he only time a taxpayer has a right to intervene in a proceeding to enforce a third-party summons of the IRS is when the movants are persons who are entitled to a notice of summons under 26 U.S.C. § 7609 . . ." (Appendix C) Since Mr. Ford was not a third-party record keeper, the court concluded that the petitioners had only a permissive right to intervention subject to a demonstration of a "significantly protectible interest." Furthermore, the court ruled that even if a significantly protectible interest could be demonstrated, the granting of intervention remains permissive and the ditrict court would be reversed only for an abuse of discretion. (Appendix C)

The court also recognized, that a taxpayer may intervene in a summons enforcement action where he can sufficiently prove that the testimony is sought for the improper purpose of obtaining evidence for use in a criminal proceeding. The court then stated that the movant-intervenors had adequately demonstrated the IRS's improper purpose. (Appendix C) Even so, the court pointed out that intervention remained in the discretion of the court and cited two factors which cut against the granting of intervention.

Judge Claiborne first noted that the movant-intervenor could always raise the violations of their interests in defense of any subsequent IRS proceedings against them. Furthermore, the court pointed to a civil suppression suit

(*Cardwell et al. v. Kurtz et al.*, No. 78-0257-MML, U.S. C.D. CA 1979) which had been filed by the movant-intervenors which alleged in the complaint essentially the same facts as were alleged in the motion for intervention. "In other words, movants presently are having their day in court on the issues at bar, and certainly a denial of intervention would not effect "the manifest injustice" or "the lending of the Court's powers to advance an illegal investigation which movants perdict." (Appendix C)

The second factor which was cited as cutting against the granting of intervention was the Court's belief that Mr. Ford could adequately represent the movant-intervenors' interests in the action. (Appendix C)

In the district court's April 27, 1979 denial of the petitioner's Motion for Reconsideration of Decision Denying Intervention, Judge Claiborne summarily noted that "[m]ovants' arguments in support of this motion are nothing more than variations on the arguments which failed the first time this motion was before me. I consider my previous order to be correct . . ."[1] (Appendix D)

### C. The Opinion of the Court of Appeals

The Court of Appeals ruled that the District Court's denial of Petitioners' motion to intervene was moot since the underlying summons enforcement proceeding had been dismissed by the Government. "Since there is no longer any action in which appellants can intervene, judicial consideration of the question would be fruitless." (Appendix E) The Court of Appeals then moved along to the attorney's fees issue:

---

[1]The court did indicate that there was one error contained in the earlier denial of intervention and made amends in its second opinion. However, for purposes of this petition, this amendment is not relevant.

> "Appellants also argue that the question of attorney's fees prevents the intervention issue from becoming moot, since the resolution of the fee issue depends on a determination of whether the district court erred in denying them leave to intervene. They claim that in order to decide whether they are prevailing parties entitled to fees under 42 U.S.C. § 1988, this Court must decide the underlying issue. We do not agree." (Appendix E)

The court went on to state that a claim of attorney's fees, although not preserving a case that has otherwise become moot on appeal, does survive independently under the court's equitable jurisdiction. The court felt, however, that it was implicit in those cases upholding attorney's fees jurisdiction, that the right to the award must be decided on the record as it exists in the underlying action and there is no right to review or redetermine any of the issues in the underlying action solely for the purpose of deciding the attorney's fees question. (See Appendix E, fn. 1) Consequently, since the appellants had been denied intervention, they were not parties and thus could not qualify as a "prevailing party" as required by 42 U.S.C. § 1988 before an award of attorney's fees is proper.

The Court of Appeals also noted one other factor for denying attorney's fees. In the Ninth Circuit, a taxpayer must be cast in the role of a defendant before he can recover attorney's fees. (*Klotz v. United States,* 602, F.2d 920 (9th Cir., 1979). The court proceeded to classify the appellants as "volunteers" and not true defendants, and held that § 1988 is not meant to reimburse for expenses incurred in aiding named parties or those who actively, but unsuccessfully seek to become parties, for expenses incurred in their attempts to become parties. The court concluded by dismissing the appeal as moot.

On August 14, 1981, appellants petitioned for a rehearing en bank which was denied on September 9, 1981 without opinion.

## REASONS FOR GRANTING THE WRIT

The first question stated above calls for a granting of the writ because it involves setting a standard for allowing intervention in 26 U.S.C. § 7602 summons cases. With the passing of 26 U.S.C. § 7609 in 1976, Congress expressed a belief that many problems inherent in the issuance of the IRS summonses could be resolved if the taxpayers under investigation were afforded a reasonable and speedy means to challenge an IRS administrative summons where appropriate. (See Tax Reform Act of 1976, Report of the Committee of Finance, United States Senate on H.R. 10612, 94-938, p. 368.) In the present case the district court found that the petitioners had demonstrated IRS improper purpose in the issuance of the summons yet still refused to allow intervention. The Court of Appeals refused to review the denial of intervention. Our research indicates that this is the only case on record where a court found that a movant-intervenor had shown improper purpose yet was denied intervention. Therefore, we believe that this is a momentous decision. The present factual scenario therefore provides the court with an excellent opportunity to expand and explain in greater detail the doctrine of permissive intervention last discussed in *Donaldson v. United States*, 400 U.S. 517 (1971), and which has received conflicting interpretation ever since. Indeed, it is hard to square the district court's decision with the prior decisions of this Court. (*Reisman v. Caplin*, 375 U.S. 440 (1964); *Donaldson v. United States, supra*) For example, under *Donaldson, supra,* this Court held that the petitioners had a protectible interest at stake in the proceedings since the summons was issued to gather further information on materials of the petitioners which had been seized by the respondents. This would indicate that inter-

vention should have been granted in this case under this Court's decisions. Consequently, the present petition raises a question of enormous importance to uniform federal tax law.

The second question presented in this petition is closely related to the first issue, as it is the petitioner's contention that the Court of Appeals' refusal to review the propriety of the district court's denial of intervention has unfairly eliminated any possibility of the petitioners receiving an award of attorney's fees like those which were awarded to Mr. Ford, the recipient of the IRS summons. 42 U.S.C. § 1988 expressly states that only "prevailing parties" can receive attorney's fees. The mooting of the intervention issue, created by the respondents dismissal of the summons enforcement action, effectively precludes the appellants from ever becoming parties. This in effect moots the entire attorney's fees issue and leaves the petitioners without remedy for the district court's erroneous denial of intervention.

The present case therefore provides the court with an opportunity to scrutinize and delineate the correct procedures and standards of review inherent in the award of attorney's fees pursuant to 42 U.S.C. § 1988 and perhaps even the Equal Access to Justice Act. Since the Equal Access to Justice Act went in effect in October of 1981, this would be the first chance for the Court to comment on its application. This case also raises the novel yet extremely important question of whether the voluntary dismissal of a cause of action moots the review of any issues already decided by a court which are determinative on a ruling on a request for an award of attorney's fees. Furthermore, the published Ninth Circuit opinion appears to hold that intervenors are volunteers and therefore are not entitled to an award of attorney's fees as are unwilling defendants under 42 U.S.C. § 1988. The legislative history which is cited below indicates otherwise. If the Court of

Appeals decision is upheld, several parties may refrain from intervening in suits in an effort to protect their civil rights as they cannot pay the necessary attorney's fees. (See 122 Cong. Rec. #35118 (Oct. 1, 1976) testimony of Mr. Seiberling.) If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, this Court must maintain the traditionally effective remedy of fee shifting. (See 1976 U.S. Code, Cong. & Admin. News, at 5913)

Furthermore, petitioners James Cardwell and Marvin Martin have subsequently been convicted under 18 U.S. § 371 and 26 U.S.C. § 7602. Since they were denied intervention and party status in the present proceeding, they have been precluded from claiming res judicata on several of the favorable findings of fact on IRS misconduct issued by the district court in the concluded trial and pending appeal from their conviction. This provides another ground for ruling that the intervention issue is not moot.

The present petition also provides the Court with an opportunity to pass on whether the issuance of the present summons by the IRS constitutes agency abuses under *United States v. La Salle National Bank*, 437 U.S. 298, fns. 19 & 20; whether 28 U.S.C. § 1331(a) guarantees a statutory right of intervention; and whether the execution of a search warrant in an IRS investigation precludes the subsequent use of IRS summonses. (See *United States v. Zack*, 521 F.2d 1366 (9th Cir., 1976).) All three of these issues are deserving of the Court's attention.

## I

## THE PETITIONERS SHOULD HAVE BEEN GRANTED INTERVENTION UNDER THE DECISIONAL AUTHORITY OF THIS COURT, BECAUSE:

### A. The District Court Found That the Unimpeached, Verified Moving Papers Seeking Intervention Showed That the Issuance of the IRS Summons Was Made for an Improper Purpose

The IRS summons issued in this case was under 26 U.S.C. § 7602. This Court has recognized in *Donaldson v. United States*, 400 U.S. 517 at 533 (1971) that intervention must be allowed where improper purpose/bad faith has been shown. In *Donaldson, supra,* this Court denied intervention *because* the moving papers did not show bad faith and/or improper purpose. The papers merely alleged that a Special Agent of the IRS, a criminal tax investigator, was investigating. This Court held that the mere appearance of a Special Agent in the investigation did not create an improper purpose for the issuance of a summons under § 7602. Hence, intervention was denied. (Also see *Powell v. United States,* 400 U.S. 48, 57-58 (1964).)

In the instant case, the district court in denying intervention made an *express* finding that the petitioners had *proven* the requisite improper purpose, but still denied intervention. (See Appendix C, p. 3 of opinion) The motion to intervene in this case was supported by *sworn* testimony of massive violations of civil rights, including threats and intimidation of witnesses, assault with a deadly weapon during a search, IRS audit fraud, fraud on the Court in obtaining a search warrant, the use of IRS summonses *after* the execution of a search warrant, and the admission by the IRS, as an institution that IRS summonses were issued solely for criminal prosecution. (See Appendix F; see also *Reisman v. Caplin*, 375 U.S. 440, 444 (1964). The moving papers for intervention are attached as Appendix G for the Court's review. The United States

never filed any declarations denying the sworn testimony supporting the motions to intervene, and the subsequent opinion of the district court found even more bad faith including the fact that the IRS auditor was an agent for the IRS Criminal Investigation Division at the time she conducted her audit of the petitioners' books and records. (See Appendix A)

Research indicates that the instant case is the *only* authority in existence where a court found that the intervenor had shown the requisite improper purpose/bad faith, but was still denied intervention. This decision and the refusal of the appellate court to decide the intervention question is directly in conflict with the authority of this Court.

The Court of Appeals also erroneously held that the intervention issue was moot. Two intervenors, Mr. Cardwell and Mr. Martin were subsequently indicted and convicted on tax evasion charges. The case is now on appeal. The failure to decide the intervention issue, and grant intervention has precluded Mr. Cardwell and Mr. Martin from advancing the doctrine of *res judicata* concerning the findings of the district court in Nevada in subsequent proceedings. This would be especially helpful in supporting the defendant's assertion that the auditor was an agent of the Criminal Investigation Division. If the petitioners were properly made parties to that action, this doctrine would be available to argue. In addition, Mr. Ford's attorneys were awarded attorney's fees of $25,000.00. If the petitioners had been allowed in, they would also be entitled to attorney's fees. (See Argument II, *infra.*) Thus, the intervention issue is not moot, but is a continuing controversy.

**B. Valid Constitutional Issues Were Raised**

In *Reisman v. Caplin, supra,* the court stated that a person could intervene as a matter of right on any appropirate ground *including* a constitutional ground. (See 375 U.S.

at 445) The *Reisman* case involved a *constitutional* ground. This Court in *Donaldson* greatly narrowed the *Reisman* definition of an "appropriate ground." However, at the beginning of the *Donaldson* opinion, this Court carefully pointed out that no constitutional ground had been raised. We quote from 400 U.S. at 522:

> "Despite the contrary intimations in the motion to intervene, there is now no constitutional issue in this case. The taxpayer on oral argument so conceded."

This Court then went on to narrow the *non-constitutional intervention rules.* Accordingly, the showing of valid constitutional grounds in a motion to intervene provides grounds for intervention as a matter of right as set forth in *Reisman,* supra. The constitutional grounds in the present case are set out in the moving papers in the district court. (See Appendix G) Again, we wish to stress that our moving papers were fully supported by *sworn* declarations, and that the last effort by the government to investigate the intervenors was declared illegal. (See *Midwest Growers v. Kirkimo,* 533 F.2d 455 (CA 9, 1976) The declarations supporting the moving papers show there were secret meetings and coordination with the ICC and other agencies including the IRS prior to the search warrant and issuance of the instant summons. One of the petitioners' grounds for intervention was the use of the search warrant followed by the use of IRS summonses was illegal, unconstitutional and in bad faith.[2]

---

[2]Subsequent to the denial of intervention, counsel for Mr. Ford took the deposition of District Counsel, IRS. It was revealed that after the execution of the search warrant of petitioners' offices, but before the present IRS summons was issued, the IRS went to District Counsel and asked to send the case to the Grand Jury, because they felt they had enough evidence to warrant prosecution. District Counsel refused and told the Special Agents to issue IRS summonses to gather additional evidence for prosecution. This is *per se* illegal under this Court's decision in *United States v.*

We also submit that the unimpeached illegal conduct of the IRS shown in the sworn declarations supporting the moving papers for intervention clearly constitute an example of the bad faith/agency abuse envisioned by this Court in *United States v. La Salle National Bank*, 437 U.S. 298, in fns. 19 and 20 (1978) as well as violations of well defined constitutional rights of the petitioners. The Court of Appeal and district court clearly ignored the precedent of this Court in refusing to allow intervention and refusing to review the denial of intervention.

Additional grounds for intervention which the Court may wish to review include the argument that the petitioners had an absolute right to intervene directly under the U. S. Constitution as this Court indicated in *Davis v. Passman*, 99 S. Ct. 2264, 2269, 2274-2275 (1979). The grounds claimed here involve the First, Fourth, Fifth and Ninth Amendments, including the due process clause. In any event, it appears that these issues can be raised under 28 U.S.C. § 1331(a) which creates an automatic statutory right of intervention on such federal questions. Since this Court decided *Donaldson*, § 1331(a) has been amended to eliminate the $10,000 damage requirement and Congress has indicated in the legislative history that it intended to give jurisdiction over the activities of government agents *and* the U.S. where it is impossible to place a dollar value on the right asserted. This statutory jurisdiction also

---

*La Salle National Bank*, 437 U.S. 298 at 316-317. Mr. Ford's counsel also took the deposition of the IRS informant mentioned in the search warrant affidavit. The informant failed to support the sworn statement of the IRS, contained in the warrant affidavit, that records would be destroyed or removed if normal procedures were used to obtain the records. We believe that our moving papers make a preliminary showing of falseness in the search warrant. The facts in this case also indicate that the District Court's denial of intervention and refusing to allow the petitioners to confront the informant was a denial of due process. This Court in *Franks v. Delaware*, 438 U.S. 154, at 170 (1978) indicated it might wish to review this very serious issue.

covers equitable actions. (See *Application of Dr. J. W. Schonfeld, Ltd.*, 460 F.Supp. 332, 334 (E.D. Va. 1978); 5 U.S. Code Cong. & Admin. News (94 Cong. 2d Session) 5121, 6134-6135; House Report No. 1656, 94th Cong. & Admin. News, 6121-6124.) Moreover, this Court, in *Califano v. Sanders*, 430 U.S. 99 (1977) held that the Administrative Procedures Act was not to be used for independent jurisdiction and indicated that amended 28 U.S.C. § 1331(a) is the proper jurisdictional section.

The petitioners also assert that under *Donaldson, supra,* there is a significant protectible interest. Using what has been alleged to be an illegal search warrant, the IRS seized the books and records of the petitioners. It then summoned Mr. Ford so as to question him about these records. The petitioners have protectible interest in their own original records and can intervene and object to the use of an IRS summons to acquire tainted information based on the illegally seized records. The Court of Appeals ignored *Donaldson* on this point.

## II

## SINCE 42 U.S.C. § 1988 PROVIDES THAT ATTORNEY'S FEES CAN ONLY BE AWARDED TO A PARTY, THE COURT OF APPEALS HAD TO DETERMINE WHETHER THE DISTRICT COURT ERRONEOUSLY DENIED THE APPELLANTS' MOTION FOR INTERVENTION BEFORE IT COULD RESOLVE THE ATTORNEY'S FEES ISSUE

42 U.S.C. § 1988 provides in part:

> ". . . in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, . . . the court, in its discretion, may allow the prevailing *party*, other than the United States, a reasonable attorney's fee as part of costs." (Emphasis added)

In the present case, the Appellate Court found that the question of attorney's fees was ancillary to the underlying action and that it survived independently under the Court's jurisdiction even though the remainder of the controversy was moot due to the district court's dismissal of the action at the request of the Government-respondents. (See Court's Opinion, Appendix E, p. 3577; *Resier v. Del Monte Properties Co.*, 605 F.2d 1135, 1140 (9th Cir., 1979); *Schmidt v. Zazzara*, 544 F.2d 412, 414 (9th Cir., 1976).) The Court's opinion, authored by District Court Judge Tashima sitting by designation, then states, however, that the issue of whether or not intervention was properly denied is moot. ". . . Midwest Growers were never parties to the enforcement action [since intervention was denied], and since they lost their motion [to intervene], they never prevailed as required by § 1988." (See Exhibit E)

With all due respect, this analysis begs the issue and invokes a procedural scenario reminiscent of Joseph Heller's novel *Catch-22*. The Court's opinion states that although the underlying controversy is moot due to dismissal, it retains jurisdiction to determine attorney's fees. However, whether or not attorney's fees are appropriate for the petitioners depends directly on whether or not the petitioners were wrongfully denied party status when their motion to intervene was rejected. How can an issue be moot when it has a direct bearing on an issue in controversy? In effect, the Court is stating that it has jurisdiction to determine attorney's fees, but does not have jurisdiction to determine the very issue upon which attorney's fees rests, i.e., whether or not the appellants were wrongfully denied the party status which is a prerequisite to acquiring attorney's fees.

In the present case, the district court found that the petitioners had demonstrated IRS improper purpose in that administrative summonses were being issued for the improper purpose of obtaining testimony for use in a crim-

inal prosecution. (Appendix B; See also *United States v. La Salle National Bank*, 437 U.S. 298 (1978).) Nonetheless, the district court denied intervention thereby cutting off any right of the petitioners to obtain attorney's fees as authorized by 42 U.S.C. § 1988. The Civil Rights Attorney's Awards Act of 1976 was designed to compensate a person who demonstrates a violation of his or her constitutional rights.

> "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." (5 U.S. Cong. & Admin. News p. 5910)

In this circumstance, the denial of an award of attorney's fees should not be based on an allegedly erroneous decision which is not subject to judicial review. The Court of Appeals by refusing to review the district court's denial of intervention is, in effect, telling the petitioners "tough luck." The district court may have wrongfully denied intervention thereby preventing the award of attorney's fees but according to the present opinion, the Court of Appeals cannot review the lower decision. Are wrongfully denied intervenors to be left without a remedy in their claim for attorney's fees after they have made a showing of governmental improper purpose in violation of their civil rights?

The petitioners respectfully submit that they are as deserving of attorney's fees as the respondent who has already been awarded close to $25,000.00. The petitioners' efforts in developing evidence of bad faith, investigative misconduct and vexatious litigation directly assisted Mr. Ford's attorneys in their efforts in the district court. The petitioners should not be denied attorney's fees merely because the district court erroneously denied intervention.

Furthermore, the fact that petitioners were not officially a party to the proceeding at the time of the dismissal with prejudice should not prevent a court from classifying the petitioners as "prevailing." The term "prevailing" as used in 42 U.S.C. § 1988 has *not* been interpreted to require an entry of judgment in favor of the party requesting attorney's fees before such an award is proper. Indeed this Court has recently held that § 1988's intent and purpose mandate the award of attorney's fees to parties who prevail in a manner other than receiving a judgment on the merits. (*Maher v. Gagne*, 100 S.Ct. 2570, 2572 (1980); See also *Coyote v. Roberts*, 27 Crim.L.Rptr. 2382, 2383 (Jan. 28, 1981) stating that attorney's fees should be awarded to the party-defendant "who have obtained some significant part of the relief sought without completing the full course of the litigation."; S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5912; *Chicago Police Officers Association v. Stover*, 624 F.2d 127, 131 (10th Cir., 1980) [pretrial settlement constitutes prevailing].) Indeed, a dismissal of a plaintiff's action with prejudice has been held to make a defendant a prevailing party for 42 U.S.C. § 1988 purposes. (*Wainwright Industries, Inc. v. Wall Street Transcript*, 80 F.R.D. 103 (S.D.N.Y., 1978).)

The petitioners attempted to intervene to block the enforcement of the summons and their efforts helped convince the government to drop their suit. Clearly, under a "significant part of the relief sought" standard petitioners qualify as prevailing since the summons was not enforced. Once again, the Appellate Court's decision that the petitioners cannot be classified as "prevailing" hinges on the fact that the district court denied intervention. However, the Court refrains from examining the correctness of the district court's denial of intervention. If intervention had been properly granted there can be little question that the petitioners would qualify as prevailing parties, just as respondent Ford who has already been awarded attorney's

fees. The denial of attorney's fees should not be the result of possible judicial error without the remedy of review of the alleged mistake. The Supreme Court should review this issue on certiorari or remand and order the Court of Appeals to review the district court's denial of intervention so a correct ruling can be made on whether or not the petitioners qualify for attorney's fees as "prevailing parties."

The present appellate decision sets forth one other factor which supposedly suggests "that an award of attorney's fees may not be proper in the case." (Appendix E) A taxpayer must be cast in the role of a defendant before he can recover attorney's fees under § 1988 in the Ninth Circuit. (*Klotz v. United States,* 602 F.2d 920 (9th Cir., 1979).) The court's present opinion attempts to draw a distinction between defendants and intervenors for purposes of awarding attorney's fees:

> "The purpose of § 1988 is to reimburse those who are sued by the government and made unwilling defendants, but who later prevail." (Appendix E, *supra*)

The opinion concludes:

> "We hold that § 1988 is not meant to reimburse volunteers for expenses incurred in aiding named parties or those who actively, but unsuccessfully, seek to become parties, for expenses incurred in their attempts to become parties."

With all due respect, the petitioners believe that being classified as "volunteers" and therefore ineligible for the award of attorney's fees is unfair and improper. It was not the petitioners who initiated the present investigation. The respondents issued the summons to Mr. Ford asking for information relevant to the petitioners' tax liability. It was also the respondents who initiated the present summons enforcement action upon which this petition is based. The

petitioners believe that the present summons was issued solely to gather evidence for a criminal proceeding in violation of *United States v. La Salle National Bank*, 437 U.S. 298 (1978).

Only by intervening could the petitioners protect their privacy and other constitutional rights which they have alleged were violated by the respondents' issuance of the administrative summons. Obviously, the petitioners would have preferred to avoid any litigation whatsoever. However, once the respondents initiated summons enforcement, the petitioners were forced to either intervene to protect their interests or watch their constitutional rights be abridged without representation. By initiating a suit against Mr. Ford to acquire evidence against the petitioners, the respondents were in effect initiating suit against the petitioners since the resolution of the proceeding directly affected the petitioners' interests. When seen in this light, the petitioners were not volunteers but merely unnamed defendants who were forced to attempt to protect their rights by way of intervention.

Inherent in the court's present denial of attorney's fees is the distinguishment between a volunteer intervenor and an unwilling defendant. The underlying suggestion is that volunteer-intervenors are ineligible for attorney's fees under 42 U.S.C. § 1988. The legislative history of § 1988 sets forth no such distinguishment. In fact the legislative history behind the enactment of § 1988 clearly recognized that individuals may often intervene in an ongoing action in an effort to protect their constitutional rights. (1976 U.S. Code Cong. and Admin. News, p. 2912, fn. 4) The clear inference is that defendant-intervenors just like the petitioners are entitled to attorney's fees under the statute. Furthermore, it is well known that "[a] party may intervene as either a plaintiff or as a defendant." (See 7 West's Federal Practice Manual § 8831, p. 444; see also *Allman v. Potts*, 371 P.2d 11 (1962); *City of San Diego v. Andrews*,

195 Cal. 111, 117 (1924).) Indeed, *City of San Diego v. Andrews, supra,* states that intervenors *"are entitled to avail themselves of all the procedure and remedies to which the defendant would be entitled* for the purpose of defeating the action, or resisting the claim of the plaintiff . . ." (Emphasis added) (195 Cal. 111, at 117.) Indeed, it would strain all credibility to hold that defendant-intervenors are entitled to avail themselves of only some, but not all of the procedural and statutory rights of a regular defendant.

The Ninth Circuit opinion carefully prefaced their distinguishing nuance between intervenor-defendants and defendants with the following footnote, however: "It is unnecessary to and we do not decide whether and, if so, to what extent a successful intervenor may recover attorney's fees under § 1988." (See Exhibit E, fn.2) By attempting to differentiate between a successful and unsuccessful intervenor while holding moot the question of whether intervention was properly denied, the Court is once again basing its denial of attorney's fees on a district court ruling which the petitioners have alleged is erroneous. If in fact attorney's fees are improper for unsuccessful intervenors but not for successful intervenors, it is unfair to refuse to determine on appeal whether or not the district court wrongfully denied intervention. How can the intervention issue be moot when the determination of the "live" attorney's fee issue depends on whether or not the petitioners' motion to intervene was properly rejected?

The question also arises whether the present attorney's fees issue should be decided under the Equal Access to Justice Act which went in effect October 1, 1981 and governs all "pending actions." (See 5 U.S.C. § 504; *Sethy v. Alameda County Water District,* 602 F.2d 894 (9th Cir., 1979); *Hutto v. Finney,* 437 U.S. 678 (1978); *Robinson v. Kinbrough,* 620 F.2d 468 (5th Cir., 1980); *Corpus v. Estelle,* 605 F.2d 175 (5th Cir. 1979).) If so, it would be immaterial whether or not the petitioners were "volunteers."

By dismissing their own suit and mooting the intervention issue, the respondents have discovered a way to escape a determination of whether or not the petitioners are deserving of an award of attorney's fees. The practice of unilaterally mooting a controversy to escape payment of an adversary's attorney's fees has been condemned by several courts and should not be allowed here. (*Chris-Craft Industries, Inc. v. Monsanto Co.*, 59 F.R.D. 282, 284 (C.D. Cal. 1973); *Larchmont Engineering, Inc. v. Toggenburg Ski Center, Inc.*, 444 F.2d 490 (2nd Cir., 1971); *Alfonso v. United States*, 613 F.2d 1309 (5th Cir., 1980).)

As the district court's award of nearly $25,000.00 to the respondent clearly indicates, the present case provides appropriate grounds for the awarding of attorney's fees. The withholding of attorney's fees from the petitioners should not be the result of possible judicial error in the denial of intervention. If anything, an award of attorney's fees to the petitioners may be more appropriate than the pre-existing award to Mr. Ford since it was the petitioner's civil rights, not Mr. Ford's, which were violated in the IRS investigation. This Court should grant certiorari, review the district court's denial of intervention and decide whether attorney's fees should be awarded to the petitioners.

## CONCLUSION

We respectfully pray that the petition be granted.

Dated: December 8, 1981

Respectfully submitted,

E.O.C. Ord
COUNSEL OF RECORD
*On behalf of the Attorneys and petitioners above named*

**(Appendices follow)**

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No. CIV-LV-78-163

UNITED STATES OF AMERICA and
DENNIS P. McCARTHY, Special Agent
Internal Revenue Service

Petitioners,

vs.

JAMES F. FORD, Las Vegas, Nevada,

Respondent.

[Filed: October 23, 1979]

DECISION

The within action is before the Court on the Application for Judicial Reconsideration, filed on behalf of the Respondent Ford. On August 16, 1978, the United States filed the within third-

party I.R.S. summons enforcement petition, wherein the government seeks an order enforcing the March 3, 1978 summons served upon Ford, so that the I.R.S. can obtain the testimony of Ford in order to determine the true tax liabilities of Midwest Growers Cooperative Corporation for the tax years 1974 and 1975. After several denials of the taxpayers' motions to intervene, etc., the United States Magistrate for the District of Nevada heard the Petition on June 19, 1979 and filed an amended Report and Recommendation on July 18, 1979, recommending that the Petition be enforced. Respondent thereupon filed this motion pursuant to 28 U.S.C. §636(b)(1).

The Respondent argues four[1] grounds for rejection of the United States

---

[1] The fifth ground has been withdrawn by the Respondent in light of the United States Magistrate's amended report and recommendation filed July 18, 1979.

Magistrate's Report and Recommendation: (1) The Respondent was denied standing to assert any of the taxpayer's defenses; (2) The Respondent was denied permission to discover through witnesses other than Special Agent McCarthy whether or not the summons was issued in good faith and whether or not the Internal Revenue Service had abandoned pursuit of any civil tax liability on behalf of the taxpayer; (3) The testimony of McCarthy indicated that he and his supervisor at the Internal Revenue Service held a conference shortly after a search and seizure was conducted at the taxpayer's offices, in order to discuss whether or not the case against the taxpayer should be taken to the Federal Grand Jury, and that they decided not to do that, but rather, to use the administrative summons as a means to gather information. Respondent contends that this constitutes

bad faith--and, as such, an absolute defense to the summons enforcement proceedings--as a matter of law; (4) The United States Magistrate refused to consider Respondent's defense that 26 U.S.C. §7602 does not give the I.R.S. the authority to obtain only the testimony of a non-taxpayer with respect to documents already in the possession of the Service.

The Court shall address the last contention first, since it raises the question of whether any type of hearing should have been held at all in this action. 26 U.S.C. §7602 reads as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized --

> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any persons having possession, custody, or care of books of account for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. (emphasis added)

Respondent would have this Court construe §§7602(2) and (3) to mean that the only person whom the I.R.S. can summon purely for testimony relating to documents in the possession of the Service is the taxpayer himself; but non-taxpayers, such

as Respondent Ford, can be summoned to testify only if they are contemporaneously summoned to produce books and records.

The contention is without merit. It is well settled that the government has the right to examine third parties with respect to any knowledge they may have bearing on the ta liabilities of a taxpayer under investigation. Application of Burr, 171 F.Supp. 448, 450 (S.D.N.Y. 1959); and see Tillotson v. Boughner, 225 F.Supp. 45 (N.D. Ill. 1963), affd. 333 F.2d 515 (7th Cir. 1964), cert. denied, 379 U.S. 913 (1964). Of course, this assumes that the government does not know beforehand what the testimony of the third party with respect to the documents in the government's possession will be. cf. United States v. Pritchard, 438 F.2d 969, 971 (5th Cir.

1971). In the case at bar, this assumption is applicable. It appears from the transcript of the proceedings before the United States Magistrate that the reason the government is interested in Mr. Ford's testimony is that the Taxpayers in this case evidently issued checks to individuals associated with Desert GMC, of which Ford is President, and claimed deductions on their 1974 and 1975 federal income tax returns based thereon; it is the theory of the I.R.S. that these individuals constitute "fictitious payees" and therefore said deductions are improper. The I.R.S. wishes to take Ford's testimony and handwriting exemplars[2] in order to confirm or deny

---

2 While the issue has not been raised, there appears to be a very serious question of whether the government has the authority under 26 U.S.C. §7602 to obtain handwriting exemplars. See: United States v. Euge, 587 F.2d 25 (continued)

their theory and I think that it goes without saying that the I.R.S. suspects but does not know for certain as of present what Ford's testimony will reveal.

Respondent argues that the cases of United States v. Hankins, 565 F.2d 1344 (5th Cir. 1978) and United States v. Romenesko, 398 F.Supp. 416, 419 (E.D. Wis. 1975) dictate a contrary result, however. Both cases are inapposite. The Hankins case stands for the proposition that the I.R.S. cannot use a §7602 summons as a guise for investigating a third party who is in fact a target of a separate criminal investigation. cf. 565 F.2d at 1351. There is no evidence in the action, however, that Respondent Ford

(8th Cir. 1978); United States v. Brown, 536 F.2d 117 (6th Cir. 1976); United States v. Del Sandro, 465 F.Supp. 1009 (W.D. Pa. 1979); but see United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977).

is such a target. The Romenesko Court did originally hold that a "person concerned," within the meaning of §7602, is the taxpayer (398 F.Supp. at 419); however, on subsequent rehearing of the Eastern District of Wisconsin reconsidered, and held that a "person concerned" within the meaning of §7602(3) is a person "summoned" under §7602(2). United States v. Romenesko, 400 F.Supp. 865 (E.D. Wis. 1975).[3] By the latter, superseding definition, therefore, the I.R.S. may seek the testimony of a third party non-taxpayer under 26 U.S.C. §7602.

The second assignment of error arises out of some confusion on the part of all parties in interpreting my orders denying the taxpayers' various motions to

---

[3] Both Romenesko decisions eventually were reversed on other grounds. 545 F.2d 578 (7th Cir. 1976).

intervene. It was never my intent to hold that Respondent Ford could assert every conceivable right that the taxpayers could assert at the hearing; it is virtually axiomatic that a third-party summonee has no standing to assert the Constitutional rights of a taxpayer at an I.R.S. summons enforcement petition hearing. United States v. Blackwood, 582 F.2d 1244, 1246 (10th Cir. 1978) and cases cited therein. At the same time, however, it is equally as virtually axiomatic that a third-party witness may challenge an I.R.S. summons on the ground that it has been issued in bad faith--i.e., that the material is sought for the improper purpose of obtaining evidence for use solely in the criminal prosecution. Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 513, 11 L.Ed.2d 459 (1964). In that regard, the circumstances surrounding the investigation and the

searches and seizures of the taxpayer are certainly relevant; while the third party has no standing to assert the constitutionality of said investigation, etc., he certainly may introduce the factual occurrences of the investigation, etc. in support of his defense of "bad faith" or "improper purpose." To the extent that the United States Magistrate refused to allow Respondent to do so, he was in error.

The final two points shall be considered together. The United States Supreme court fairly recently laid out the particulars of the "bad faith" or "improper purpose" defense in United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), as follows:

> The line between permissible civil and impermissible criminal purposes . . . [cannot be drawn] on the basis of the [special] agent's personal

intent. To do so would unnecessarily frustrate the enforcement of the tax laws by restricting the use of the summons according to the motivation of a single agent without regard to the enforcement policy of the Service as an institution . . . . As a result, the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS. . . . This means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service.

Without doubt, this burden is a heavy one. Because criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former. On the other hand, we cannot abandon this aspect of the good-faith inquiry altogether. We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would

> permit the Government to expand its criminal discovery rights. Similarly, the good-faith standard will not permit the IRS to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases.

98 S.Ct. at 2367-2368. Since the Supreme Court handed down LaSalle, two different circuits have held that where the evidence sufficiently raises the possibility that an inordinate or unexplained delay in investigation has transpired, raising the possibility that an indictment is being held up pending compliance with the summons sought to be enforced, the District Court commits reversible error in not allowing further discovery into the issue of "bad faith" or "improper purpose." United States v. Chase Manhattan Bank, 598 F.2d 321, 326-327 (2nd Cir. 1978); United States v. Genser, 595 F.2d 146, 152 (3rd Cir. 1979), appeal

after remand, 602 F.2d 69, 72 (3rd Cir. 1979).

Based upon the documents contained in the official Court file and upon the transcript of the June 19, 1979 hearing, the Court has gleaned the following operative facts:

1) The taxpayer, Midwest Growers ("Midwest") is an agricultural cooperative association operating trucks which make interstate shipments.

2) Midwest was victorious in litigation against the Interstate Commerce Commission concerning an application by the I.C.C. for an administrative search warrant, following the I.C.C.'s recommendation to the Department of Justice of prosecution of Midwest for alleged abuses of regulatory exemptions. Midwest Growers Co-Op Corp. v. Kirkimo, 533 F.2d 455 (9th Cir. 1976).

3) Shortly thereafter Internal Revenue Agent Sharon Rivard approached Midwest and represented to Midwest that it was the subject of a routine audit. In fact, Revenue Agent Rivard was acting under the supervision of Internal Revenue Service Special Agent Fleischman, of the Intelligence Division of the I.R.S.; the selection for audit was prompted by a report of a confidential informant to the Intelligence Division of the I.R.S.; the audit was specifically performed to obtain information of criminal activity so that a search warrant could be obtained; and the audit lasted for a period of time far exceeding three days.

4) McCarthy first began to investigate Midwest Growers on December 6, 1976, under orders by the chief of the Intelligence Division, Raymond Turner.

5) The Intelligence Division sought and obtained a search warrant of

the premises of Midwest on January 12, 1977, upon the application of Special Agent Fleischman. Fleischman and McCarthy led a large team of Special Agents in conducting the search and seizure on the same date; the search took several hours, and the agents seized all or virtually all of Midwest's corporate records.

6) About a month after the search, McCarthy and others in the Intelligence Division held a group conference and the group decided not to turn its information over to the Department of Justice, but rather, to wait and to use administrative summons as a means of gathering more information.

7) McCarthy had discussions concerning Midwest with the I.C.C., the F.B.I., and with the Customs Service. He testified that he personally did not

divulge any information to the F.B.I. concerning Midwest Growers.

8) On July 18, 1977, Special Agent McCarthy examined Ernest Rains, a former employee of Midwest, and McCarthy stated that the sole purpose of his questions to Rains was to gather evidence in and of a criminal prosecution against Midwest. At the June 19 hearing of the within matter, McCarthy explained that what he meant by this statement was that the investigation of Midwest is a joint civil and criminal investigation, and that his sole purpose was to gather evidence in and of a criminal prosecution against Midwest.

9) Midwest made an offer to settle the question of its tax liability for the years 1974 and 1975 by paying a certain sum of money, on the condition that no criminal prosecution be instituted against it. The I.R.S. rejected this offer.

10) The within action was filed on August 16, 1978, seeking to enforce the March 3, 1978 summons, which was served on Respondent over a year after the search and seizure of Midwest.

From the point of view of the government, the best thing that can be said for this investigation is that it is primarily a criminal investigation, with ancillary civil aspects. That would not make it improper per se. United States v. Genser, 602 F.2d 69, 71 (3rd Cir. 1979). However, I am not prepared at this juncture to enter this as a finding of fact. The evidence before the Court to date leaves me with the impression that the Midwest investigation is so overwhelmingly criminal in nature that I have to wonder whether the Internal Revenue Service as an institution really is interested in the potential civil liability of Midwest. it seems to me

that the testimony of Revenue Agents Rivard and Lipman[4] and Special Agents Fleischman and Turner would be relevant and indeed helpful in shedding some light on the true institutional posture of the I.R.S. with respect to Midwest Growers Co-Op Corp.

In summation, then, I hold that Respondent has presented evidence sufficient to raise the possibility that the Internal Revenue Service is conducting this summons enforcement proceeding in bad faith or for an improper purpose and, accordingly, further discovery is required by the recent cases of United States v. Chase Manhattan Bank, supra, and United States v. Genser, supra. Accordingly, the within matter shall be remanded to the United States Magistrate

---

[4] who is Revenue Agent Rivard's successor in the "civil" aspects of this investigation.

for further proceedings in not less than ninety days in accordance with this opinion. Recognizing the fact that I.R.S. summons enforcement proceedings are ordinarily supposed to be summary in nature, and that discovery in that regard is supposed to be limited (cf. United States v. Ladd, 471 F.Supp. 1150, 1153, n. 3 (N.D. Tex. 1979)), I will allow Respondent to conduct discovery for a period of ninety (90) days and only ninety (90) days. Respondent may embark upon whatever course of discovery of the issue of bad faith he feels is in his best interests, within the above-imposed time limits; however, I will also inform all parties concerned of the issues in which I am primarily interested:

1) Why the Internal Revenue Service waited for over a year subsequent to the search before serving the within summons upon Respondent;

2) The precise contents of the communications between employees of the Internal Revenue Service at the "group conference meeting" following the search of the Midwest premises and, in particular, whether the potential civil liability of Midwest was discussed at said meeting;

3) Whether anybody in the Internal Revenue Service other than Special Agent McCarthy communicated with any person in the Department of Justice concerning the potential criminal liability of Midwest Growers Co-Op Corp., and if so, both the substance and the result(s) of said communications;

4) Whether any employee of the Interstate Commerce Commission has acted as an intermediary of the Department of Justice in any communication with any employee of the Internal Revenue Service with regard to the potential criminal

liability of Midwest Growers Co-Op Corp.;

5) The nature and particulars of the Internal Revenue Service investigation, if any, into the potential civil liability of Midwest Growers Co-Op Corp; and

6) The position of the Internal Revenue Service with respect to the potential criminal liability; if any, of Respondent Ford.

An order shall be entered concurrently herewith.

DATED: Nevada, October 15, 1979.

H. E. Claiborne
U. S. DISTRICT COURT JUDGE

## APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No. CIV-LV-78-163

UNITED STATES OF AMERICA and
DENNIS P. McCARTHY, Special Agent
Internal Revenue Service

Petitioners,

vs.

JAMES F. FORD,

Respondent.

[Filed May 12, 1980]

DECISION

The within action is before the Court on the Motion to Dismiss, filed on behalf of the Petitioners pursuant to F.R.C.P. Rule 41(a)(2). On March 3, 1978, the Government served an I.R.S.

summons upon Respondent Ford, the ostensible purpose of which was to obtain the testimony of Ford in order to determine the true tax liabilities of Midwest Growers Cooperative Corporation for the tax years 1974 and 1975. Ford refused to testify and the Petitioner filed the within third-party I.R.S. summons enforcement petition on August 16, 1978. After nearly two years of protracted litigation in this, a supposedly "summary" proceeding, the Government now seeks a voluntary dismissal. The principal reason for this is to initiate a request for criminal grand jury proceedings and referral from the Internal Revenue Service to the Department of Justice.

F.R.C.P. Rule 41(a)(2) states that an action shall not be dismissed in a case such as this, where all of the pleadings are in and the parties have not

stipulated to a dismissal, except upon such terms and conditions as the court deems proper. The Rule states further that unless otherwise specified, a dismissal is without prejudice.

The key issue on a motion such as this is whether the party opposing dismissal would be prejudiced by a dismissal. Wainwright Securities, Inc. v. Wall St. Transcript, 80 F.R.D. 103, 105 (S.D.N.Y. 1978), and cases cited therein. Respondent points to two reasons why he might be unduly prejudiced by a dismissal of this action: 1) that there would be a very real possibility that the I.R.S. will reinstitute the use of administrative summons against the taxpayer; 2) he will lose his opportunity to collect costs and attorneys fees if the Petitioner's motion is granted. Respondent will be pleased to learn that neither of his contentions is correct.

As to the first point, it is quite clear that the Internal Revenue Service is not allowed to refer a matter to the Department of Justice for criminal prosecution and then, while criminal proceedings are ongoing, to issue a third-party summons (and institute a third-party summons enforcement proceeding) in aid of determination and collection of revenue; such a procedure puts the I.R.S. in the position of being an information-gathering agency for the Department of Justice. Cf. United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 2367-2368 (1978). In that instance, a summons would clearly be issued in bad faith and for an improper purpose. Thus, the first argument assumes that the I.R.S. will act in bad faith and for an improper purpose if the motion to dismiss is granted. The Court does not deem it appropriate to make

such an assumption about any party before this Court without factual support.

As to the second point, for reasons stated above, it follows that dismissal will have to be with prejudice. That being the case, the case relied upon by the Government, Wainwright Securities, Inc. v. Wall St. Transcript, supra, stands for the proposition that, in granting the plaintiff's motion to dismiss his own action with prejudice pursuant to F.R.C.P. Rule 41(a)(2), the defendant is the prevailing party. 80 F.R.D. at 108, and authorities cited therein. If Respondent Ford is the prevailing party, he is then entitled to his costs per the applicable statute, which in the case at bar is 42 U.S.C. §1988. Patzkowski v. United States, 576 F.2d 134, 137-139 (8th Cir. 1978); Bryant v. United States, 456 F.Supp. 174, 175-176 (E.D. Pa. 1978). The aforecited

cases stand for the proposition that an award of attorneys fees is authorized under §1988 where the federal government's action was instituted in bad faith or was frivolous, harassing or vexatious.

In this case, I do not deem it appropriate to rule on the issue of whether this action was initiated in bad faith; that is an issue which inevitably will be raised and decided if the taxpayers herein are indicted. However, it is crystal clear that Respondent has vigorously litigated this action. He has used his discovery privileges to the fullest extent possible in this supposedly "summary" action. Now, as we near the decision stage of this action, with a few apparently unresolved discovery matters, the Federal Government wants to put a halt to its own action. In reply to the opposition to the Motion to Dismiss, the Government goes on for

some length about what a meritorious action this is. If the Government really and truly believes that fact, then I simply cannot understand why it wants its own action dismissed.

If it were local governmental officials who were undercutting litigation in this fashion, then the individual(s) clearly would be entitled to attorney's fees under 42 U.S.C. §1988. See Hartman v. Gaffney, 446 F.Supp. 809, 812 (D.Minn. 1977); Donaldson v. O'Conner, 454 F.Supp. 311, 316-317 (N.D. Fla. 1978). I see no reason why the Federal Government should be held to a loftier standard than that. Accordingly, I hold that the within, dispositive Motion to Dismiss is certainly vexatious under the circumstances and, accordingly, Respondent should be entitled to reasonable attorney's fees, as well as costs.

An issue has arisen as to the reasonableness of the claimed attorney's fees in this case, which is $23,431.25. The Court deems it more appropriate to determine this issue on a Motion to Tax Costs per F.R.C.P. Rule 54(d) than at the present time.

The Court shall enter an Order concurrently herewith.

ORDER

The within action having come before the Court on a Motion to Dismiss per F.R.C.P. Rule 41(a)(2), filed on behalf of the Petitioners, and the Court having decided the same by way of Decision filed concurrently herewith, WHEREFORE, IT IS HEREBY ORDERED,

1) That the Motion to Dismiss, filed on behalf of the Petitioners, is granted.

2) That the within action is dismissed with prejudice, for reasons stated in said accompanying Decision;

3) That the Clerk shall enter Judgment of Dismissal, with costs and attorney's fees per. 42 U.S.C. §1988 to be awarded to Respondent.

DATED: Nevada, May 12, 1980

H. E. CLAIBORNE
U. S. DISTRICT COURT JUDGE

# APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No. CIV-LV-163

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs.

JAMES F. FORD,

Respondent.

[Filed February 9, 1979]
[Entered Feburary 13, 1979]

## MEMORANDUM DECISION AND ORDER

The United States and Special Agent Dennis P. McCarthy have brought a

petition pursuant to 26 U.S.C. §§7402(b) and 7604(a) to enforce a summons served on James F. Ford of Las Vegas, Nevada. The Summons arises out of a tax investigation of the liabilities of Midwest Growers Cooperative Corporation in Los Angeles. Respondent has had business dealings with the taxpayer, and the Internal Revenue Service (IRS) seeks to obtain Respondent's testimony pertaining thereto.

Presently before the Court is a motion by Midwest Growers and James Cardwell, Marvin Martin, Coast Express, Inc., West Coast Systems, and Interstate Carriers, Inc. (hereinafter referred to as "movants") to intervene for the purposes of opposing enforcement, and for expedited decision based thereon. In a nutshell, movants' position is that they have a right to intervene under F.R.C.P. Rule 24(a), in that they have been

subjected to a bad faith criminal investigation by the I.C.C. and the I.R.S., the IRS thus far has obtained its information in direct violation of the movants' 1st, 4th, 5th and 9th Amendment rights, this summons enforcement amounts to nothing more than "fruit of the poisonous tree," and the I.R.S. already has the information which it seeks in its possession.

The only time a taxpayer has a right to intervene in a proceeding to enforce a third-party summons of the I.R.S. is when the movants are persons who are entitled to a notice of the summons under 26 U.S.C. §7609--that is to say, when the summons is served on a third-party recordkeeper (as defined by 26 U.S.C. §7609(a)(3)) and requires production of records made or kept of the business transactions or affairs of the taxpayer. 26 U.S.C. §7609(b)(1); United States v.

Exxon Co., U.S.A., 450 F.Supp. 472, 474-475 (D. Md. 1978); United States v. J. Joseph Gartland, Inc., 79 F.R.D. 148, 149-150 (D. Md. 1978). In all other instances, a taxpayer may intervene in a third-party summons enforcement proceeding only if he can demonstrate a "significantly protectible interest." Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971). And even if he can demonstrate such a "significantly protectible interest," intervention nonetheless remains permissive only, and the district court will be reversed only for abuse of discretion.[1]

---

[1] Movants argue that the Third Circuit opinion of United States v. Genser, 78-1, USTC ¶9268 stands for the proposition that the taxpayer has an absolute right to intervene where he can show that the sole purpose of the summons inforcement proceedings is to obtain evidence for a criminal prosecution. The Third Circuit (continued)

Garrett v. United States, 511 F.2d. 1037, 1038 (9th Cir. 1975); United States v. Luther, 481 F.2d. 429, 433 (9th Cir. 1973).

In the case at bar, Respondent Ford is not a third-party recordkeeper within the meaning of 26 U.S.C. §7609(a)(3): he is not a bank, consumer reporting agency, or broker; and there is nothing before this Court which could indicate that he was the movants' attorney or accountant, or extended credit to the movants through the use of credit cards or similar devices. Therefore, the movants were not entitled to notice of summons under §7609(a), and they have no right to intervene in this proceeding. 26 U.S.C. §7609(b)(1).

---

withdrew the Genser opinion from publication at its own request. 572 F.2d. 406. The reason is obvious: this holding is incorrect as a matter of law. Movants' heavy reliance on the Genser case is therefore misplaced.

As to permissive intervention, it is true that a taxpayer may intervene where he can sufficiently prove that the material [testimony] is sought for the improper purpose of obtaining evidence for use in a criminal prosecution. Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534, 542, 27 L.Ed.2d, 580. And, it is also true that, for purposes of this motion, movants have adequately demonstrated the I.R.S.' "improper purpose." Even so, intervention remains within the discretion of the Court, and two factors decisively cut against this Court's exercise of discretion in the movants' favor.

First of all, the reason that intervention remains permissive, even upon demonstration of a "significantly protectible interest," is that the taxpayer can always claim that interest

in defense of subsequent I.R.S. proceedings against the taxpayer. Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534, 542, 27 L.Ed.2d. 580 (1971); Garrett v. United States, 511 F.2d. 1037, 1038-1039 (9th Cir. 1975). In the case at bar, the taxpayers-movants have in fact already done that. They filed an action in January, 1978 in the Central District of California (Cardwell et al v. Kurtz et al., no. 78-0257MML) for suppression and return of evidence and injunctive relief. They alleged in that complaint essentially the same facts as in their moving papers in this action, and the injunctive relief which they seek, if granted, is possibly broad enough to affect these proceedings. In other words, movants presently are having their day in court on the issues at bar, and certainly a denial of intervention would not effect "the manifest injustice" or "the lending

of the Court's powers to advance an illegal investigation" which movants predict.

The second reason is that Donaldson is really nothing more than an interpretation of F.R.C.P. Rule 24(a)(2) to this kind of proceeding, and the wording of Rule 24(a)(2) indicates that, even if the movants demonstrate a significantly protectible interest which may as a practical matter be impaired, they cannot intervene if their interests are adequately represented by the existing parties. See United States v. Greenleaf, 546 F.2d. 123, 129 (5th Cir. 1977). To obtain enforcement of summons, the I.R.S. must show, inter alia, that the investigation will be conducted pursuant to a legitimate purpose, and that the information sought is not already within the service's possession. United States v. Church of Scientology of California,

520 F.2d. 818, 821 (9th Cir. 1975), and cases cited therein. Respondent has raised these issues in opposing the petition in the case at bar and, in support of his opposition, makes the identical arguments which movant has made in his motion to intervene. Therefore, it appears to this Court that respondent can adequately represent the movants' interests in the action at bar.

The movants have requested oral argument on their motion, unless the Court grants it. Under Rule 16(g) of the Local Rules of Practice for this Court, I have the discretion to deny the request. Movants have filed a grand total of 58 pages of points and authorities and 177 pages of exhibits to this motion, and I cannot imagine what else could be said about this matter that could lead to a different result.

WHEREFORE, IT IS HEREBY ORDERED that the Motion to Intervene and for an expedited decision is denied.

DATED: Nevada, February 8, 1979.

H. E. CLAIBORNE
U. S. DISTRICT COURT JUDGE

# APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No. CIV-LV-78-163

UNITED STATES OF AMERICA and
DENNIS P. McCARTHY, Special Agent
Internal Revenue Service

Petitioners,

vs.

JAMES F. FORD,

Respondent.

[Filed April 22, 1979]
[Entered April 30, 1979]

## MEMORANDUM DECISION AND ORDER

On February 8, 1979, this Court denied a motion to intervene, filed on behalf of proposed Respondents-in-Intervention, Midwest Growers and James Cardwell, Marvin Martin, Coast Express, Inc., West Coast Systems, and Interstate Carriers, Inc. (hereinafter referred to as "Movants"). Movants have appealed from that order, and also have brought on the following motions: 1) Motion for Reconsideration of Decision Denying Intervention; 2) Motion for Stay Pending Appeal; 3) "Motion to withdraw memorandum decision and order to vacate judgment entered thereon, and to remove this proceeding from the calendar of the court during the pendency of a related civil suppression action."

MOTION FOR RECONSIDERATION

Movants' arguments in support of this motion are nothing more than variations on the arguments which failed the

first time this motion was before me. I consider my previous order to be correct, with one exception:

On the first-go-round, Movants argued that the Third Circuit opinion of United States v. Genser, 78-1, USTC ¶9268 stands for the proposition that a taxpayer has an absolute right to intervene where he can show that the sole purpose of the summons enforcement proceedings is to obtain evidence for a criminal prosecution. Since the Third Circuit withdrew the Genser opinion from publication (572 F.2d 406), I did not know what the Third Circuit actually held. Assuming that counsel for Movants had accurately stated the law to me, I surmised in Footnote 1 of my February 8 order that the reason for withdrawal from publication was that such a holding would be incorrect as a matter of law. As it turns out, the reason for withdrawal had nothing to do

with that; because the Supreme Court had just decided United States v. LaSalle National Bank, 98 S.Ct. 2357 (1978), the Genser Court vacated the opinion and remanded the action for an evidentiary hearing in light of LaSalle. See United States v. Genser, 1979 Standard Federal Tax Reports, ¶9275 (3rd Cir., 3/25/79).

However, it also turns out that counsel for Movants has totally misstated the Genser holding at all relevant times, and evidently is operating under a very fundamental misapprehension in this area of the law. There are, among others, two separate, independent, and distinct issues in a third-party I.R.S. summons enforcement proceeding: 1) Whether a taxpayer has a right to intervene, or whether the Court should exercise its discretion in allowing the taxpayer to intervene in this kind of proceeding; 2) Whether the proceeding is instituted

for an improper purpose--i.e., purely in aid of a criminal investigation. Issue #1 is the only issue at bar; issue #2 is typically but not necessarily one posed by a Respondent as an affirmative defense to a third-party summons enforcement petition. The Genser III opinion addresses issue #2 only. Since Genser arose out of a criminal conviction for tax evasion in which the Government obtained some of its evidence by an allegedly improper third-party summons enforcement proceeding, it obviously has nothing to do with the issue of intervention.[1/] Therefore, Movants' heavy reliance upon the Genser case continues to be misplaced.

---

[1/] Indeed, Movants in the case at bar have not been indicted for any tax crime at this time.

MOTION FOR STAY PENDING APPEAL

As a general rule, a Defendant is not entitled to a stay of proceedings, even where he gives a supersedeas bond, if he is appealing from an unappealable order. R.D. Goldberg Theatre Corp. v. Tri-States Theatre Corp. (D. Neb. 1944) 119 F.Supp. 521; and see 4 Corpus Juris Secondum, "Appeal and Error," §632. In the case at bar, it appears that while the Ninth Circuit may change its mind in the near future, it currently follows the rule that where allowance of intervention is merely permissive under the Court's discretion, denial of leave to intervene is not appealable. Blake v. Pallan, 554 F.2d. 947, 951, n.5 (9th Cir. 1977).

It also would appear to be the rule that one who is not a party to the action in which a stay is sought has no standing to bring a motion for stay. See Bailey

v. Patterson, 368 U.S. 346, 82 S.Ct. 282 (1961).

MOTION TO WITHDRAW ETC.

Movants argue that in United States v. Bank of America, et. al., U.S.D.C.C.D. Cal.#CV-78-980,MML, another third-party summons enforcement proceedings involving the Movants-Taxpayers, the Court ordered that said proceedings be stayed, upon stipulation of the parties, pending resolution of the Movants' California civil suppression action (Cardwell et. al. v. Kurtz et. al., U.S.D.C.C.D.Cal. #78-0257,MML), and that that order requires that this Court likewise stay these proceedings under the doctrines of res judicata and collateral estoppel. They rely upon the recent Supreme Court decision of Montana v. United States, 47 U.S.L.W. 4190 (2/22/79) in support of their position.

Once again, their reliance is misplaced, as the Montana case has absolutely nothing to do with the collateral estoppel or res judicata effect of a stay order; that case had to do with the res judicata effects of a state court's final judgment concerning the constitutionality of a tax on contractors on the government's federal action challenging the constitutionality of the same tax.

Only a final judgment invokes the doctrine of res judicata. G & C Merriam Co. v. Saalfield, 241 U.S. 22, 38, 36 S.Ct. 477 (1916). An interlocutory decree or order does not afford the basis for a plea of res judicata unless in respect to some matter it makes a final disposition, in which case it is res judicata as to that one matter. 1B Moore's Federal Practice at 1002. The same "final judgment" rule applies to the

doctrine of collateral estoppel. Id. at 3771. Moreover, the doctrine of collateral estoppel applies to questions of fact, meaning to the merits of the action, as opposed to questions of procedure. See Parklane Hosiery Company, Inc. v. Shore, 47 U.S.L.W. 4079 (1/9/79).

Since a stay order is not a final judgment, is not a final determination of any question of fact, and by no stretch of the imagination is dispositive of any issues, Movants collateral estoppel/res judicata theory has no merit.

Movants also argue that if this Court does not stay this proceeding, it could suffer irreparable harm if it should come to pass that this Court orders Respondent to testify, and subsequently they are successful in the California suppression action. Anybody can make bald predications, however, and I would predict that if Movants are

successful in the California suppression action, the Government is not going to have much use for Respondent's testimony, insofar as the Movants' potential criminal liability is concerned.

WHEREFORE, IT IS HEREBY ORDERED:

1) That the Motion for Reconsideration, filed on behalf of proposed Respondents-in-Intervention, Midwest Growers and James Cardwell, Marvin Martin, Coast Express, Inc., West Coast Systems, and Interstate Carriers, Inc., is denied;

2) That the Motion for Stay Pending Appeal, filed on behalf of proposed Respondents-in-Intervention, Midwest Growers and James Cardwell, Marvin Martin, Coast Express, Inc., West Coast Systems, and Interstate Carriers, Inc., is denied; and

3) That the Motion "to withdraw memorandum decision and order, to vacate

judgment entered thereon and to remove this proceeding from the calendar of the court during the pendency of a related civil suppression action," filed on behalf of proposed Respondents-in-Intervention, Midwest Growers and James Cardwell, Marvin Martin, Coast Express, Inc., West Coast Systems, and Interstate Carriers, Inc., is denied.

DATED: Nevada, April 27, 1979.

H. E. CLAIBORNE
U. S. DISTRICT COURT JUDGE

# APPENDIX E

PUBLISH

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-3914

UNITED STATES OF AMERICA, and
DENNIS P. McCARTHY, Special Agent,
INTERNAL REVENUE SERVICE,

Petitioners-Appellees.

vs.

JAMES F. FORD.

Respondent,

MIDWEST GROWERS COOPERATIVE,
JAMES CARDWELL, MARVIN MARTIN,
COAST EXPRESS, INC., WEST COAST SYSTEMS
and INTERSTATE CARRIERS, INC.

Movants-for-Intervention-Appellants.

Appeal from the
United States District Court
for the District of Nevada.

Argued Feb. 10, 1981

Submitted March 3, 1981

Decided July 17, 1981

Rehearing Denied September 9, 1981

OPINION

Before SNEED and ANDERSON, Circuit Judges, and TASHIMA.* District Judge.

TASHIMA, District Judge.

Appellants (collectively referred to as "Midwest Growers" or "appellants") have appealed from the district court's denial of their motion to intervene in a third-party Internal Revenue Service ("IRS") summons enforcement proceeding. The IRS issued the summons to James Ford, requiring him to produce handwriting exemplars and give testimony relating to the tax liability of Midwest Growers. When Ford refused to cooperate, the IRS filed its summons enforcement petition. Subsequently, Midwest Growers moved to intervene as parties defendant, pursuant to Rule 24(a) Fed.R.Civ.P. The motion to

---

* The honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

intervene was denied and this appeal followed.

However, developments in the underlying summons enforcement proceeding since this appeal was filed have altered the issues raised by this appeal. On March 28, 1980, after the trial court had found sufficient evidence of IRS "bad faith" or "improper purpose" in conducting the civil summons proceeding to grant respondent Ford discovery on those issues, the government filed a motion to voluntarily dismiss its petition. That motion was opposed by Ford on two grounds: (1) that the government might later issue a new summons to him, and (2) that a dismissal would cost him his opportunity to receive an award of attorney's fees. The district court granted the government's motion to dismiss, but with prejudice, on May 12, 1980; it also awarded Ford his attorney's

fees and costs. On May 22, 1980, the government filed a "Motion for Reconsideration of Decision or Amendment of Order under Rule 52(b) or 59(e) Fed.R.Civ.P., or in the Alternative to Withdraw Petitioner's Motion to Dismiss." This motion was denied in all respects on October 15, 1980. The government has now appealed the award of attorney's fees, but has not appealed the denial of the motion to withdraw the motion to dismiss.

Based on the foregoing proceedings in the underlying action, on February 4, 1981, the government filed a suggestion of mootness of the present appeal. That suggestion was opposed by appellants at oral argument on the ground that the issue of their right to attorney's fees remained to be settled. We now address these two issues.

Mootness

[1] Because the underlying summons enforcement proceeding has been dismissed by the government, the district court's denial of appellants' motion to intervene has now become moot. Since there is no longer any action in which appellants can intervene, judicial consideration of the question would be fruitless. CF. SEC v. Baird, 598 F.2d 1162, 1163 (9th Cir. 1979) (appeal of order compelling testimony became moot when testimony was voluntarily given); Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir. 1969), cert. denied, 397 U.S. 1027, 90 S.Ct. 1273, 25 L.Ed.2d 538 (1970) (appeal from denial of earlier issued injunction became moot when action was dismissed for refusal to grant discovery); Ruby v. Pan Am World Airways, Inc., 660 F.2d 691 (2d Cir. 1966) (appeal from denial of preliminary

injunction becomes moot when complaint is dismissed).

In opposing the suggestion of mootness, appellants rely on Church of Scientology v. United States, 485 F.2d 313 (9th Cir. 1973), contending that there is still a justifiable controversy because "under substantial authority the appellant cannot be deprived of a determination of the merits simply because the appellees want to talk a 'walk' from the case and hide their misconduct." They argue that if the case is declared moot, they will not have an opportunity to litigate their claims of constitutional violations and IRS misconduct, and the government will be able to avoid civil discovery which may reveal further misconduct.

However, Church of Scientology, supra, is not on point. That case held that the district court properly denied a

government motion to dismiss an action as moot after the plaintiff refused to accept the government's tender of an amount equal to that which the plaintiff would have received had it prevailed in its tax refund suit. The decision was based on the fact that the controversy over the Church's tax exempt status was an ongoing one and would occur every year, cf. United States v. W. P. Grant, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (voluntary cessation of allegedly illegal conduct moots case only where the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated), and that there were collateral consequences to the Church based on its indeterminate status, i.e., it was denied the right to certain postal rates and the right to solicit financial support on the basis that gifts would be tax deductible as religious contribu-

tions. Cf. Sibron v. New York, 392 U.S. 40, 53-55, 88 S.Ct. 1889, 1897-98, 20 L.Ed.2d 917 (1968) (completion of sentence will not moot appeal of criminal case if judgmnent of conviction may entail collateral consequences); Ginsberg v. New York, 390 U.S. 629, 633 n. 2, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (same, payment of fine and penalty.)

From appellants' citation of Church of Scientology and their argument that they will be deprived of an opportunity to litigate their claims of constitutional violations and IRS misconduct, it is apparent that they misconceive the issue on this appeal and the relief which the Court can afford them. This is an appeal of appellants' motion to intervene, not an appeal of any order or judgment of the district court on the merits in the underlying action. Even if

we are to conclude that the district court erred in denying appellants' motion to intervene, none of their claims could be adjudicated now that the summons enforcement proceeding has been dismissed. Since there is no proceeding in which appellants can intervene, this appeal is moot.

Attorneys Fees

Appellants also argue that the question of attorney's fees prevents the intervention issue from becoming moot, since the resolution of the fee issue depends on a determination of whether the district court erred in denying them leave to intervene. They claim that in order to decide whether they are "prevailing parties" entitled to fees under 42 U.S.C. §1988, this Court must decide the underlying issue. We do not agree.

[2.3] Although a claim for attorney's fees does not preserve a case which otherwise has become moot on appeal, see Washington Market Co. v. District of Columbia, 137 U.S. 62, 11 S.Ct. 4, 34 L.Ed. 572 (1890), prior decisions of this Court have established that the question of attorney's fees is ancillary to the underlying action and survives independently under the Court's equitable jurisdiction. Reiser v. Del Monte Properties Co., 605 F.2d 1135, 1140 (9th Cir. 1979), Schmidt v. Zazzara, 544 F.2d 412, 414 (9th Cir. 1976.[1] Therefore, we have jurisdiction to decide the only question before us, whether the appellants are "prevailing parties" under the

---

[1] It is implicit in these cases that the attorney's fees question is to be decided on the record as it exists in the underlying action, i.e., there is no right to review or redetermine any of the issues in the underlying action solely for the purpose of deciding the attorney's fees question.

relevant statue, 42 U.S.C. §1988, which provides in part:

> ... in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[4] Although the ordinary procedure to be followed is to remand the case to the district court for a determination of the attorney's fees issue, see Doe v. Marshall, 622 F.2d 118, 119 (5th Cir. 1980), we believe that remand is not necessary in this case, since there is no factual issue to be resolved. In this case, Midwest Growers were never parties to the enforcement action, and since they lost their motion, they never prevailed as required by §1988.

[5] Moreover, there are additional considerations which suggest than an

award of attorney's fees may not be proper in this case. In this Circuit, a taxpayer must be cast in the role of defendant before he can recover attorney's fees. Klotz v. United States, 602 F.2d 920 (9th Cir. 1979). Thus, a taxpayer who petitions the Tax Court for relief from an excessive assessment and wins may not recover attorney's fees because he has not been a defendant in an action brought by the government. Kipperman v. C. I. R., 622 F.2d 431 (9th Cir. 1980). Similarly, in this case, appellants took the initiative in attempting to intervene in the enforcement proceedings against Ford. The purpose of §1988 is to reimburse those who are sued by the government and made unwilling defendants, but who later prevail.[2]

---

[2] It is unnecessary to and we do not decide whether and if so, to what extent a successful intervenor may recover attorney's fees under §1988.

[6] We hold that §1988 is not meant to reimburse volunteers for expenses incurred in aiding named parties or those who actively, but unsuccessfully, seek to become parties, for expenses incurred in their attempts to become parties. To the extent that appellants' contention that the appeal is not moot because mootness would deprive them of the opportunity to seek attorney's fees, that request is denied.

The appeal has become moot and, therefore, is DISMISSED.

# APPENDIX F

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

INTERNAL REVENUE SERVICE

INTELLIGENCE DIVISION

INTERROGATION OF ERNEST RAINS, )
)
IN THE MATTER OF MIDWEST GROWERS )
COOPERATIVE CORPORATION )

Los Angeles, California

July 18, 1977

Carol Ann Hargreaves Co.
Reporters-Notaries
2120 West Eighth Street
Los Angeles, California 90057
381-2164

Q What is your present occupation?

A. Owner-operator.

Q. Of a truck?

A. Yes.

Q. What is the address of your current occupation?

A. Same address.

Q. Out of the house?

A. Yes.

Q. How long have you been in this particular owner-operator status?

A. Just a little over a year.

Q. What did you do before that?

A. Drove a truck.

Q. For whom?

A. Midwest Growers.

Q. You were a salaried employee of Midwest Growers?

MR. ORD: I would like to ask a couple of questions. What is your

purpose of interrogating this witness? I think that he is entitled to know the purpose of your interrogation.

MR. McCARTHY: This concerns my investigation of Midwest Growers.

Mr. Rains was an employee of Midwest Growers and I would like to ask him certain questions about his employment there.

I have certain documents which I would like to have him identify.

This investigation is against Midwest and Mr. Rains here is a witness.

MR. ORD: I assume you mean a criminal investigation being conducted of Midwest?

MR. McCARTHY: That's correct.

MR. ORD: And that evidence I assume you are getting for the purpose of a criminal prosecution; is that correct?

MR. McCARTHY: That is an investigation now leading to criminal prosecution.

MR. ORD: That is your purpose of your asking these questions?

MR. McCARTHY: That is the sole purpose.

MR. ORD: That is the sole purpose?

MR. McCARTHY: Right. That's correct.

MR. ORD: I assume you will limit the questions then to his involvement with Midwest?

MR. McCARTHY: What I am going to ask him is relevant in this investigation.

MR. ORD: Okay. I just wanted to get the scope of the inquiry here.

MR. McCARTHY: Can I continue?

MR. ORD: I would just like to say that I don't want you to go forward and ask questions -- for the purpose of the

record, I am speaking on behalf of this witness and I object to him being subpoenaed and admissible testimony taken in this matter. And we reserve our rights for a subsequent proceeding. And we are not waiving any rights by allowing you to proceed.

We just want to be cooperative and want this witness to testify so he can be excused because he is a trucker and has to get paid and work.

# APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No. CIV-LV-78-163

UNITED STATES OF AMERICA and
DENNIS P. McCARTHY, Special Agent
Internal Revenue Service

Petitioners,

vs.

JAMES F. FORD, Las Vegas, Nevada,

Respondent.

[Filed November 28, 1978]

MOTION TO INTERVENE AND FOR
AN EXPEDITED DECISION

PLEASE TAKE NOTICE that movants, MIDWEST GROWERS COOPERATIVE, JAMES CARDWELL, MARVIN MARTIN, COAST EXPRESS, INC., WEST COAST SYSTEMS, and INTERSTATE CARRIERS, INC., pursuant to Rules 8(f), 19(a), 21, 24(a)(2) and other applicable rules, Federal Rules of Civil Procedure, hereby move the Court to allow the above stated parties to intervene in the above captioned summons enforcement action.

As the grounds the movant intervenors state:

1. Their financial affairs are contained in the information sought by the summons.

2. The movants have constitutional rights of privacy under the First and Ninth Amendments, U.S. Constitution in the information sought and/or Fourth and Fifth Amendment rights in illegally seized records which will be used to question the summonee or otherwise be

used or identified in the interrogation. These constitutional and proprietary interests constitute grounds for intervention.

3. The intervenors will allege violations of constitutional rights in their response to the petition to enforce the summons as well as an improper purpose and bad faith as outlined in U.S. v. La Salle Bank, -U.S.- (1978) including the allegations in the complaint of Cardwell, et. al. v. Kuntz, et. al., CV. No. 78-257-MML and have submitted clear and convincing evidence of same in the attached declarations in support of this motion. These allegations and evidence always constitute a right to intervene.

4. The movants will allege that the information sought is already within the possession of the Internal Revenue Service.

5. The movants will allege that the investigation has been held back from going to the Justice Department for prosecution so evidence can be gathered by summons.

6. The Court of Appeals for the Ninth Circuit summarily reversed the District Court in Los Angeles for refusing to allow some of the movants to intervene. The movants further request the Court to make an expedited decision on the application and grant oral argument unless the Court wishes to allow intervention after reading the moving papers and reply of the government.

7. The attached Memorandum of Points and Authorities and Exhibits.

WHEREFORE, the intervenors request the Court to grant the motions.

A proposed Order is attached.

DATED: November 25, 1978.

EDWARD O. C. ORD, INC.

EDWARD O. C. ORD,
Attorney for the
Intervenors.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO INTERVENE
STATEMENT

This is an action, in equity, by the UNITED STATES, and Special Agent DENNIS P. McCARTHY, asking this Court to use its equitable powers to enforce and [sic] administrative summons seeking to compel MR. JAMES F. FORD to testify and examine documents. (See generally the petition to enforce the summons).

The above summons enforcement action and the concomitant right to intervene can only be understood by the examination of the past history of the conduct of the U.S. government as an institution through its agents. Since the conduct of the U.S. government has been so shocking and outrageous the statements made herein are backed up by the Declarations Under Penalty of Perjury which are submitted in

a separate document entitled "DECLARATIONS IN SUPPORT OF MOTION TO INTERVENE". Most citations herein will be to the master declaration of EDWARD O. C. ORD. This declaration, in turn, cites to the subsidiary declarations.

James Cardwell and Marvin Martin are individuals and Marvin Martin is also a corporate officer of Midwest Growers Co-operative. [sic] (hereinafter referred to as Midwest). Coast Express, Inc., West Coast Systems, and Interstate Carriers are corporations. All of these individuals and corporations have been victim of illegal searches, seizures and harassment, etc. (to be discussed hereafter)

Midwest Growers, it has been admitted, is the subject of an investigation solely for the purpose of gathering evidence for a criminal prosecution. (See Admissions of the IRS, Ord Declara-

tion, p. 12, lines 11-32; p. 12, lines 1-16). The IRS is obviously conducting the same type of investigation on the remaining movant-intervenors. (See Search Warrant and supporting Fleischman Affidavit (Exhibit 2 in declarations)

Midwest Growers et. al. has had a long history of litigating with the government over its operations. This first culminated in the issuance and execution of an illegal search warrant against Midwest by Special Agents of the Interstate Commerce Commission (hereafter referred to as the ICC). The District Court and the Court of Appeals for the Ninth Circuit declared that the warrant violated the Fourth Amendment. The case is reported at 533 F 2d [sic] 455 (C.A. 9, 1975). This prior history has also included coordinated governmental harassment by other government agencies such as warrantless custodial searches and

interrogations by Treasury Agents. (See Scully Declaration, Exhibit 1).

After losing in the Ninth Circuit the government next assigned the Internal Revenue Service to make a pass. After secret inter-agency meetings the Intelligence Division selected Sharon Rivard, a Revenue Agent, to contact Midwest and inspect the books and records. She was coordinated and controlled by a Special Agent Fleischman. As Sharon Rivard got ready to audit secret inter-governmental commuunications continued. (See Ord Declaration, pp. 2-3).

Sharon Rivard inspected the books and records of Midwest and some or all other corporations mentioned above during October and November 1976. Prior to, at the beginning of the inspection, during, and at the announced completion of the inspection she made false, material statements to obtain, maintain, and

complete her inspection. For instance, at initial contact with Midwest she represented that the inspection would only take two or three days, while in secret inter-governmental agency communications to other investigative brethren, the IRS stated that it was not known how long the inspection would last. (See Ord Declaration, pp. 3-4). She also lied by stating that the audit was "routine" and the return was selected for audit by the computer when in fact in sworn testimony the IRS admits the Intelligence Division was behind the audit and it was not routine. (See Ord Declaration, pp. 3-5). In fact, the audit was planned solely to get evidence of criminal activity so a search warrant could be obtained. (See Exhibit 2, Affidavit of Fleischman).

After the inspection, which lasted over a thirty-day period, Sharon Rivard

announced the inspection was over and proposed civil adjustments. She also lied by stating that there were no other problems. She left and the next day made a formal referral of the matter back to the Intelligence Division!

During the period September 1976 - January 1977, the IRS as an institution sought and obtained and executed a search warrant to search and seize the corporate records of Midwest, Coast Express, West Coast Systems, and Interstate Carriers. It also illegally seized personal records of Mr. Cardwell and Mr. Martin and others.

Before obtaining the warrant, the IRS, as an institution, is required by its own IRS manuel [sic] guidelines to have the case file and investigation reviewed at the highest legal levels of the IRS and obtain approval from the Justice Department. Internal review

includes review by Regional Counsel and Chief Counsel IRS in Washington, D.C. After this review was completed the warrant was obtained and executed by the IRS even though in direct violation of the controlling decisional case law of the Court of Appeal for the Ninth Circuit. (See Ord Declaration, p. 8, lines 4-32, p. 9, lines 1-32, p. 10, lines 1-32, p. 11, lines 1-16).

The search warrant application was accompanied by an affidavit signed by Special Agent Fleischman. The affidavit was riddled with intentionally false statements or ones made in reckless disregard of the truth as will be detailed below. These statements vitiate any search warrant according to the Ninth Circuit. (See Ord Declaration, p. 6, lines 10-14).

Since Mr. Fleischman's creditability is at issue, the following facts appear

relevant. Special Agent Fleischman holds a unique position in the annals of California legal history. He served the longest recorded sentence for contempt of Court in California recorded legal history, and apparently began working on Midwest shortly after being released from jail. California legal history also records that he has declined to answer questions on the grounds of self-incrimination for crimes including child stealing and he has been civilly [sic] charged and adjudged with practicing deceit and trickery by a Virginia Court. Special Agents Fleischman and McCarthy are alumni of the Las Vegas Intelligence Div., IRS office.

As indicated above, the Fleischman affidavit contained grave omissions and false or reckless statements. Here are some documented samples.

The affidavit failed to advise the Court that the evidence of alleged criminal activity cited in the affidavit had been illegally obtained by fraud, deceit and trickery and in violation of the U.S. Constitution. (See Ord Declaration, p. 3, lines 16-32, p. 4, lines 5 and 6.)

The affidavit also failed to advise the Magistrate that the warrant would violate 26 U.S.C. Sec. 7605(b). [Requiring written notice before a second inspection of the taxpayers books and records.] (See Ord Declaration, p. 3, par. 9, 14, lines 17-24.)

Sharon Rivard's 30 day inspection constituted the first inspection. The affidavit falsely stated that any effort to obtain the sought records by any other means other than the warrant would cause the records to be destroyed or put beyond the reach of the government. The affi-

davit also included other statements which were either untrue or standing alone were innocent or ordinary events. However, these statements were collected together in a manner to mislead or in reckless disregard of the truth. (See Ord, supra.) [sic]

After obtaining the search warrant, Special Agent Fleischman and McCarthy gathered together a team of between 18 and 35 armed Special Agents. On January 12, 1977, the IRS agents surrounded the multi-use, multi-tenant building in Los Angeles within which are located the executive headquarters of Midwest Growers. Fleischman and McCarthy and others then entered the executive offices of Midwest in a manner which violated the "no knock" provisions of 18 U.S.C. Sec. 3109. (See Ord, p. 17, lines 23-30).

The entry was then made with drawn guns, and the executive headquarters

became a virtial [sic] federal detention and interrogation center. The declarations indicate that:

a. Corporate employees and officers were falsely imprisoned for many hours without any arrest warrant or benefit of legal document.

b. Peaceful persons were ordered around at gunpoint.

c. One peaceful employee was assulted [sic] with a deadly weapon and possibly kidnapped.

d. There was a custodial line-up where employees were required to provide drivers licenses and hand writing samples were extracted without any Miranda warnings given.

e. Employees and officers, while in custody, one by one were interrogated in a threatening

manner in the xerox room which had been converted into a [sic] interrogation room.

f. Individuals were prevented from calling their attorney [sic].

g. In executing the search warrant the Agents may have committed crimes under 18 U.S.C. Sec. 2233 and 2234.

h. Searched and seized evidence beyond the express scope of the warrant.

i. The business was shut down, armed guards were posted outside the building to prevent people from coming in or leaving.

After many hours, the agents left with the corporate records of Midwest and either searched or copied some or all of the records of the remaining corpora-

tions. (See Ord, p. 11, lines 16-32, p. 12, lines 1-3.)

Then Special Agent McCarthy began to issue administrative summonses to develop evidence from the previously obtained tainted evidence. McCarthy in his judicial capacity as a hearing officer under the Administrative Procedures Act admitted and ruled on behalf of the IRS as an institution that the summonses were being issued solely to gather evidence for a criminal prosecution. (See Ord, p. 12, lines 17-32, p. 13, lines 1-15). [sic]

It has also been admitted that the summonses are being issued to obtain evidence intimately connected with the search warrant. (See Ord, p. 14, lines 1-27). [sic]

Since that time the IRS has continued its institutional misconduct, under supervision of IRS legal counsel,

including but not limited to unlawfully interferring [sic] with a certified Court reporter, denying Midwest its right to make a record during administrative proceedings, practicing deceit on witnesses and falsely advising them of their rights, unlawfully excluding legal counsel, terrorizing one corporate employee in her home and committing an assault and battery on a third party while trying to extract hand writing [sic] samples. (See Ord, p. 14, lines 28-32, p. 15, lines 1-32, p. 16, lines 1-13.)

False declarations have also been filed in Federal Court by Special Agent McCarthy in Los Angeles and in this Court. (See Ord, p. 13, lines 16-32.)

In January, 1978, James Cardwell, Marvin Martin, Midwest Growers, Coast Express, Inc., West Coast Systems, Inc., and Interstate Carriers instituted a

civil action for the suppression and return of evidence seized and [sic] for injunctive relief. The complaint was amended on March 14, 1978. The suit was against the Commissioner of IRS, Revenue Agent Sharon Rivard, the U.S. Attorney and others. (See Declarations, Exhibit 20). [sic] and Exhibit A.

The suit involves three distinct types of searches and seizures made in violations of the plaintiffs' Constitutional rights. They are:

a. An unlawful inspection and audit for the purpose of criminal prosecution obtained by a scheme of material misrepresentation of the fact with respect to the prupose [sic] of the inspection and audit;

b. A search and seizure of the plaintiffs' records obtained by a seach warrant issued without

probable cause and based on an affidavit containing material misstatements of fact;

c. During the execution of the warrant described in (b.) above, the seizure of records of persons not described in the warrant and the search of places not covered by the warrant;

d. Following the unlawful inspection and audit and execution of the warrant described above, the unlawful issuance by the IRS of administrative summonses for the sole purpose of obtaining evidence for criminal prosecution.

The following is a more complete description of the allegations of the Amended Complaint:

a. Count I

Prior to June 26, 1975, the IRS began an investigation of Midwest Growers with the intent of imposing criminal liability (Exhibit A and paragraph 6). As part of this plan, the defendants arranged for Revenue Agent Sharon Rivard to approach Midwest for the sole purpose of obtaining evidence for criminal prosecution (paragraph 7). In order to obtain access to Midwest's records, Agent Rivard engaged in a successful scheme of positive material misrepresentation of fact concerning the purpose of the inspection and audit in which she was engaged including representations that the audit was routine and did not have as its purpose the investigation of possible criminal liability (paragraph 9). Contrary to the representations made by Agent Rivard, the audit was not routine but was a planned special investigation

to obtain evidence for a criminal prosecution and for a search warrant (paragraph 10). Plaintiffs relied on the misrepresentations made by Agent Rivard and permitted unrestricted access to plaintiffs' books and records (paragraph 12). By reason of the foregoing, the inspection of Midwest's books and records was in violation of the plaintiff's [sic] Fourth Amendment rights under the United States Constitution as well as other Consttutional [sic] rights (paragraph 14). By reasons of the actions alleged, plaintiffs suffered irreparable harm in that they were not able to assert Constitutional rights available to them, records illegally inspected and seized were used by defendants to develop further information leading to a criminal prosecution, as a basis for obtaining a search warrant, and as a basis for the illegal

issuance of administrative summonses (paragraph 15).

b. Count II:

Following the inspection and audit referred to in Count I, defendants obtained a search warrant permitting defendants to search Offices 5 and 6 located at 7236 East Slauson Avenue and to seize all corporate books and records of plaintiffs Midwest Growers, Coast Express, West Coast and Interstate (paragraph 21). At the time the defendants applied for the search warrant, defendants failed to advise the Magistrate who issued the search warrant that the affidavit submitted contained material misstatements or omissions of fact. These included (1) a statement by defendants that any attempt to obtain records from plaintiffs by normal procedures would cause the records to be destroyed although defendants had already fully

inspected and audited plaintiffs' records during the Rivard audit; (2) defendants' failure to disclose that the search and seizure sought was an illegal second inspection of plaintiffs' books and records in violation of 26 U.S.C. Sec. 7605; and (3) defendants' failure to disclose that the Rivard audit had been obtained by fraud, deceit and trickery and other misrepresetations [sic] (paragraph 22). Following the issuance of the search warrant, defendants executed it through the use of 18 or more armed Special Agents of the Internal Revenue Service Intelligence Division. Plaintiffs' employees were forced into one room and detained, not advised of their Miranda rights, forced to give handwriting examples, and interrogated for over seven hours (paragraph 23). In addition, defendants searched and seized offices and desks belonging to plaintiffs Card-

well and Martin who were not named in said search warrant and searched and seized materials in offices other than those described in the search warrant (paragraph 26). The search warrant was issued without probable cause and based upon an affidavit which contained material misstatements of fact as well as upon information obtained by defendants by fraud, deceit and trickery in violation of plaintiffs' rights under the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. In addition, the search was an illegal second inspection of plaintiffs' records (paragraph 28). Plaintiffs have suffered irreparable injury as more completely alleged in paragraph 29.

c. Count III:

Subsequent to the execution of the search warrant, defendants began to issue and have issued unknown [sic] number of

administrative summonses allegedly under 26 U.S.C. Sec. 7602. These summonses have been issued based on the illegally obtained documents, evidence and investigative leads described in Counts I and II (paragraph 35). The obtaining of evidence solely for criminal prosecution through the use of administrative summonses is illegal, for an improper purpose, and an abuse of process (paragraph 36).

d. Count IV:

Since January, 1977, plaintiffs in writing and orally have requested access to records seized by defendants which requests have been ignored. Denial of access to these records constitutes a denial of the plaintiffs' right to counsel under the Sixth Amendment of the United States Constitution (paragraph 45). Most of the original records were returned in August 1978, but the IRS has

copies as well as an unknown number of copies of records searched at the executive headquarters but not seized.

After the complaint was amended the plaintiffs noticed the depositions of Rivard, Fleischman, McCarthy and others and requested production of all documents relevant and material to the suit. The government then moved to dismiss the suit and obtained a protective order blocking all discovery until the motion to dismiss was decided. The District Court took the motion to dismiss under advisement on June 26, 1978.

In June, the government filed several summons enforcement actions in the District Court. These were assigned to the same District Judge who was hearing the civil suppression action. The Court set all the summonses for summary hearing on August 21, 1978.

During the of August 14, 1978, to August 17, 1978 the District Court denied some of the instant movants intervention in summonses issued under Sec. 7602. [sic] This is the same section the instant summonses is [sic] issued under. (See Ord, page 22.)

On August 18, 1978, at 10:00 A.M. a notices [sic] of appeal of the intervention denials were [sic] filed and a motion on relief including summary reversal was filed in the Court of Appeals. The Court of Appeals read the declarations offered to this Court and the legal authorities submitted. At about 2:45 P.M. the same day the District Judge was summoned from the bench during a mail fraud trial and was advised by the Ninth Circuit he would be summaraly [sic] reversed unless he agreed to withdraw his denial of intervention orders and take the summons matter off calendar until the

civil suppression action was decided. He agreed and the appeals were then remanded. (See Ord, page 22.)

Since that time, the District Court has taken no further action in the civil suppression action. (See Ord, page 22.)

On August 16, 1978, the instant petition to enforce a summons was filed in this Court.

## ARGUMENT

I. THE MOVANT INTERVENORS HAVE A RIGHT TO INTERVENE WHICH HAS RECENTLY BEEN ENDORSED BY THE NINTH CIRCUIT.

A. Introduction

Since the Court may not be familiar with the nature and past legal history of Sec. 7602, the following is submitted:

1. Applicable Statutes and Federal Rules of Civil Procedure.

26 U.S.C. Sec. 7602 basically authorizes the IRS to issue civil process for the purpose of gathering information or data to ascertain a tax liability or to collect a tax. It cannot be used as a substitute for a grand jury subpoena to gather evidence for a criminal indictment or prosecution or otherwise be used to invade a parallel what [sic] would be gathered by a grand jury during an investigation. If a summons is not honored, the U.S. District Court has

jurisdiction to compell [sic] compliance upon the application by the government. See 26 U.S.C. Sec. 7604.

Rule 81(a)(3) of the Federal Rules of Civil Procedure states that the Federal Rules apply to such enforcement proceedings except as otherwise provided by statutes or by rules of the U.S. District Court or by the order of the Court in the proceedings.

Rule 24 of the Federal Rules of Civil Procedure provides for intervention by a party in an action commenced between other parties. Under paragraph (a) of the Rule, a party shall be permitted to intervene upon timely application, "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the deposition of the action may as a practical matter impair or impede his ability to protect that

interest, unless the applicant's interest is adequately represented by existing parties." The remaining cited rules provide similar grounds for intervention.

2. Judicial Limitations On The Use Of The Summons And The Taxpayer's Right To Challenge The Validity Of The Summons.

In addition to the statutory conditions for a valid Internal Revenue Service summons, certain limitations on permissible use have been imposed by judicial decision. Likewise, the Courts have spelled out some of the circumstances wherein the taxpayer will or will not be permitted to challenge the validity of the summons in an enforcement action.

The starting point for a discussion of these judicially developed rules is Reisman v. Caplin, 34 U.S. 440 (1964).

There, the IRS wanted access to the workpapers and records of the taxpayer which were in the possession of his accountants. A suumons [sic] was issued directing the accountants to produce all audit reports, work papers and correspondence in their custody pertaining to the taxpayer. The accountants notified the taxpayer they planned to comply with the summons. The taxpayer sued the accountants and the government for declaratory and injunctive relief. The Supreme Court affirmed a dismissal of the Complaint on the ground that the taxpayer was not entitled to declatory [sic] and injunctive relief because he had an adequate remedy at law, to wit: the right to challenge the summons before the hearing officer or before the Courts. In so ruling, the Court at (pp. 449-450) made the following pertinent points:

1. When a summons is issued to a third party, the taxpayer or any one else affected by a disclosure of the information or documents subject to the summons may challenge the summons enforcement action. This would include the defenses that the material sought for the improper purpose of obtaining evidence for the use in a criminal prosecution, or that it is protected by a privilege such as attorney-client privilege or a constitutional issue exists.

2. If a Federal Court upholds the summons, its order is appealable and an order staying enforcement of the summons is appropriate until the appeal is decided.

3. The taxpayer or other affected person can sue to restrain compliance of the summonee by the summons until compliance is ordered by a Court of competent jurisdiction, and the taxpayer is en-

titled to seek assurances that the summonee will not comply with the summons.

In United States v. Powell, 379 U.S. 48 (1964), decided shortly after Reisman v. Caplin, the Internal Revenue Service summoned a corporate taxpayer's president to give testimony and produce corporate records relating to his personal tax liability. The Court expressed the following additional limitations on the government's power to enforce the summons (at pp. 57-58):

Reading the statutes as we do, the commissioner need not meet any standard of probable cause to obtain enforcement of his summons, either before or after his three year statute of limitations on ordinary tax liabilities has expired. He must show that the investigation will be conducted pursuant to the legitimate purpose, that the inquiry may be relevant

to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed in particular, that the Secretary or his delegate, after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect. This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he may challenge the summons on any appropriate ground, Reisman v. Caplin, 375 U.S. 440, at 449 11 L ed 2d 459, at 466, S Ct 508. [sic] Nor does our reading of the statutes mean that under no circumstances may the Court inquire to the underlying reasons for the examination. It is the Court's process which is invoked to enforce the administrative summons and a Court may not

permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the Court's process is on the taxpayer, . . . . (emphasis added)

Thus, the Powell case reaffirmed the right of the taxpayer to an adversary hearing on the enforcement of the summons. Moreover, it clearly indicated that at such a hearing the Court may inquire into the underlying reasons for the examination; if it is to be determined that the summons was issued for an improper purpose, such as to obtain information already in the possession of the government, or for any other purpose

reflecting on the good faith of the investigation, it would constitute an abuse of the Court's process to order enforcement.

The Powell case did not involve a third party summons, wherein the taxpayer involved would be able to assert his challenge only by intervention. However, there certainly is nothing in the rationale of Powell to suggest that the taxpayer would not have a standing to challenge the validity of an improper third party summons by intervention, as permitted by Reisman v. Caplin.

Subsequently, in Donaldson v. United States, 400 U.S. 517 (1971), the U.S. Supreme Court was called upon to review this area of the law and the decision resulted in certain modifications of the earlier rules. There the Internal Revenue Service issued a summons to a taxpayer's former employer and accountant

for the production of the employer's employment and compensation records during taxpayer's reporting years under investigation. The employer and accountant declined to produce the records. Taxpayer obtained injunctions prohibiting compliance with the summons until a final Court decision was made in an enforcement action. The Internal Revenue Service then sued to enforce the summonses against the employer and accountant. The taxpayer sought to intervene in the enforcement proceeding relying on Rule 24(a)(2) of the Federal Rules of Civil Procedure. The Court denied the motion and ordered the summonses enforced.

The Donaldson Court first carefully noted that no constitutional grounds had been alleged as part of the motion to intervene, See 400 U.S. 517, 522. The Donaldson Court, after reviewing Reisman and Powell then concluded that they did

not guarantee the taxpayer an absolute right to intervene in an action brought to enforce a third party summons. The right of intervention in such case was held to be permissive only and not mandatory. The following discussion of Reisman in the Donaldson opinion reflects the Court's reasoning, including the circumstances under which intervention would be regarded as proper:

> "The [Reisman] language recognized that the District Court upon the customary showing may allow the taxpayer to intervene. Two instances where intervention is appropriate were specified, namely, where the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution or where it is protected by the attorney-client privilege. Thus, the Court recognized that

> intervention by a taxpayer in an enforcement proceeding might well be allowed when the circumstances are proper. But the Court did not there pronounce, even when confronted with a situation concerning the attorney's work product, that the taxpayer possesses an absolute right to intervene in any internal revenue summons proceeding. The usual process of balancing opposing equities is called for. (Id. at 530.)

The Court further concluded that the language of Rule 24(a)(2) of the Federal Rules of Civil Procedure, speaking in general terms of "an interest relating to the property or transaction which is the subject of an action", obviously means a "significantly protectable of interest". With respect to the particular situation presented in Donaldson, the Court con-

cluded the taxpayer did not have significantly protectable interest in the records sought by the summons, because the records consisted only of the employer's own routine business records which the taxpayer had no proprietary interest of any kind as to which no privilege existed. The taxpayer's only interest was that the records concerned details of payments by the employer to the taxpayer possessing federal income tax significance. Such interest was deemed not of significant magnitude for the Court to conclude that he should be allowed to intervene. (Id. at 531.)

The taxpayer in Donaldson also argued that the Internal Revenue summons proceeding may not utilized at [sic] all in aid [sic] an investigation that has a potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer. The

Court rejected such contention but approved the proposition that "where the sole objective of the investigation is to obtain evidence for us in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied". (Id. at 533.)

The Court went on to discuss the established investigatory procedures wherein an investigation may be jointly carried on by both a Special Agent and an Agent of the Audit Division. Their combined efforts are directed to both Civil and Criminal infractions, and "any decision to recommend prosecution comes only after an investigation is complete or is suffucuently [sic] far along to support appropriate conclusions". (Id. at 535.) Accordingly, the Court refused to draw the line as to the use of the summons procedure at the mere appearance of the Special Agent in the case and

stated, "under Section 7602 an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution". (Id. at 536) However, the Court failed to state which recommendation for prosecution counted or to define what improper purpose or bad faith meant.

Consequently, it is clear that a taxpayer may intervene in an action to enforce an IRS summons directed to a third party if the taxpayer has alleged a "significantly protectible [sic] interest" in the summoned records, if the summons was issued in bad faith or for an improper purpose, or where constitutional issues are raised, or where it is issued after a recommendation for a criminal prosecution.

It is also clear that the Court is required to accept the allegations of the

intervenors as true for the purpose of allowing intervention and the allegations should be liberally construed as required by Rule 8(f), Federal Rules of Civil Procedure. See U.S. v. Newman, 441 F.2d 165, 171 (C.A. 5, 1971). In June of 1978, the U.S. Supreme Court in La Salle Bank v. U.S., --U.S.-- supplemented the Donaldson case. In La Salle, the District Court had found that the IRS agent, acting alone, was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct. The Court stated that:

> "The present case requires us to examine the limits of the good-faith use of an Internal Revenue summons issued under Sec. 7602". (See slip opinion, p. 18, Appendix B, Infra.)

The Court on pp. 23 and 24 ruled that after an income tax investigation has been referred to the Justice Department

for prosecution there is an absolute ban (or bad-faith per se) on the issuance of a summons under Sec. 7602.

The Court then went on to rule on 26-28 that is [sic] a summons issued prior to a recommendation to Justice, the summons will be issued in bad faith if the IRS is using it to gather evidence solely for criminal prosecution.

The Court, however, stated that the inquiry is not limited solely to the intent of the investigating Special Agent. Instead, the "institutional posture of the IRS must be examined to see if the IRS has deferred or abandoned its pursuit of the taxpayers civil tax liability". If this is found to be the case then the summons is issued for an improper purpose or in bad faith.

The Court also stated that "We shall not countenance delay in submitting a recommendation to the Justice Dept. where

there is an institutional commitment to make referral and the Service would like to gather additional evidence for the prosecution". Such as delay would be tantamount to the use of the summons after a recommendation and would permit the government to expand its criminal discovery rights.

Finally, the Court declined to say that the good faith and improper purpose language of Powell was a complete definition. The Court enlarged the definitions by stating on page 19 and footnotes 19 and 20 that the Powell statements were only examples of bad faith. The Powell statements ". . . are not intended to be exclusive. Future cases may be used to reveal the need to prevent other forms of agency abuse of congressional authority and judicial process."

The Court then declared that the lower Court decision had to be reversed

as a legal error, because the Court had relied only on the intent of the investigating agent. It sent the case back for further proceedings and inquiry.

In summary then, when an intervenor alleges a constitutional issue, "significantly protectible [sic] interest", improper purpose, bad faith, or that the information sought is already possessed, intervention must be allowed.

B. Intervention Rights Defined

The Movants [sic] have alleged that the summons have been issued solely to gather evidence for a criminal prosecution and have attached sworn declarations and even an admission and ruling by the IRS as an institution druing an administrative hearing that the summonses were being issued solely to gather evidence for a criminal prosecution. Also, the evidence and leads upon which the IRS is issuing the instant summons were obtained

through fraud on the taxpayers, the Court and in violation of the U.S. Constitution. (See Statement of Facts, supra, and cited declarations.) Finally, a pattern of bad faith and illegal governmental abuse has been depicted. (See Statement of Facts, supra, & cited declarations.) [sic]

Recently, the Third Circuit in U.S. v. Genser, 78-1, USTC, ¶9268, especially p. 83,560, has expressly ruled that the above is absolute right of intervention. There, the taxpayer had no notice of the issuance of the summonses. The evidence was used at the trial and the defendant moved to suppress on the grounds that the evidence had been obtained with a summons for the sole purpose of gathering evidence for a criminal prosecution. The Court reversed the conviction and sent the case back for a hearing on whether the IRS summonses had been issued solely

to gather evidence for criminal prosecution. If so, the evidence (bank records) were to be suppressed. To reach this decision, the Court had to decide that the defendant had standing and a right to intervene in a summons enforcement action. As will be noted later, the Ninth Circuit in this investigation has expressly indicated our right to intervene and reversed summarily a District Judge who refused to allow intervention and, recognized the validity of this case. (See Ord, page 22.)

The movants will allege that the case has been delayed being sent forward to the Justice Department so as to gather evidence for prosecution. The alleged criminal investigation is of Midwest and under a search warrant, the IRS has admitted it has the alleged fruits and instrumentaltion [sic] of the crime. It would have gone to the Grant Jury and

sought an indictment, but instead held back and begaan [sic] to issue 7602 IRS summones [sic]. La Salle Bank, supra, expressly states this is a ground for intervention.

The movants have alleged and submitted shocking evidence of harassment, fraud, deceit, violation of constitutional rights, possible criminal conduct including assault and battery, and the distinct possibility that Special Agent McCarthy has filed false declarations in Federal Courts. Both here and in Los Angeles! [sic]

If the above does not constitute bad faith under Powell and "other agency abuse" under La Salle, the undersigned believes that none would ever exist.

The movants have demonstrated an illegal search warrant was obtained and executed by the IRS in direct violation of the decisional law in this Circuit and

the United States Constitution, and the U.S. Code. The instant summons has been issued in flagrant violation of Judge Foley's Zack decision. This certainly is in bad faith. (See Statement of Facts and cited declarations.) [sic]

The movants have a constitutional right of privacy under the First and Ninth Amendment of the U.S. Constitution.

Also, Article I, Section I, California Constitution provides an express right of privacy which is incorporated under the due process provisions of the Fourteenth Amendment into the First and Ninth Amendments. The California Constitution Section I will be discussed in more detail below after discussing the applicable federal cases under the First and Ninth Amendments.

In NAACP v. Alabama, 357 U.S. 449, 458-462, the Court expressly recognized that individuals had privacy rights under

the First Amendment of the U.S. Constitution and incorporated in the due process clause of the 14th Amendment. There the state of Alabama sought and obtained Court orders compelling production of membership lists and the related financial transactions of the members of the NAACP, a non-profit corporation. The state argued that the corporation had no standing to object to the disclosure of this information and the objection of privacy under the First Amendment through the due process clause into the State Constitution was personal to the members. The Court agreed. However, the Court allowed the NAACP to raise it, because a denial of standing to the corporation would defeat the personal privacy rights of the members of the very moment of its assertion. See pp. 458-459. Consequently, this case squarely holds that a person has privacy rights in

corporate records under the First Amendment, if this right can only be abridged where valid legal process is used. See 458-464. This Court again in Griswold v. Conn., 381 U.S. 479 (1965) visited this area and even expanded the rules. There the Planned Parenthood Association of Connecticut and the Director, Mr. Griswold, were prosecuted for criminal violations involving the dispensing of birth control measures. Mr. Griswold asserted the Constitutional right of privacy guaranteed by the First Amendment of all married persons with whom he has associated with! The Court ruled that he had standing to assert the rights of these individuals. See 381 U.S. 479, 481. The Court stated at p. 483:

> "In other words, the First Amendment has a penumbra where privacy is protected from government intrusion. In like context, we have protected forms of association that . . .

> pertain to the . . . legal, and economic benefit of members."

On page 484, the Court continued:

> "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees creates zones of privacy."

In the concurring opinion, Justice Goldberg and the Chief Justice stated they thought that the Ninth Amendment was more appropriate. They point out that the Ninth Amendment was added by James Madison to eliminate any later legal opinion that rights, (including privacy) that were in existence when the Bill of Rights was enacted were repealed, because the specific right was not mentioned in the Bill of Rights. See pp. 448-491. The concurring opinion expressly states that the Ninth Amendment expressly preserves privacy. The defendant can almost ask the Court to take judicial

notice that the right of financial privacy existed in Colonial times. However, see Pavesich v. New England Mutual Life Insurance Company, 50 S.E. 68, 70, 71 (1905) and Melvin v. Reid, 112 C.A. 285 [privacy flows from doctrine of inalienable rights]; City of Carmel v. Young, 2 C.3d. 259, 263 (1970).

As indicated above, Article I, Section I of the California Constitution expressly gives every California resident or company doing business in the state the right of financial privacy. It was passed in a referendum in November, 1972. The Ballot (legislative history, see Appendix A, infra) expressly states that this right should be abridged only when there is compelling need, and was passed to limit government abuse and snooping. As noted by the above decisions, this Constitutional right is incorporated in the due process clause of the 14th

Amendment and into the First Amendment of the U.S. Constitution. This privacy right in the records and information cannot be abridged except by lawful summons. See California Bankers Assoc. v. Schultz, 416 U.S. at 52. Also, see Burrows v. Superior Court, 13 C.3d 238 (1974)(voluntary compliance with oral request to see bank records illegal).

As indicated in the above U.S. Supreme Court cases, the right to privacy under the First and Ninth Amendments are [sic] so powerful that entities or third party individuals are even allowed to assert these personal rights. Accordingly, the movants have a right to intervene on this ground alone.

The intervenors do respectfully submit, based on the attached declarations, that the Movants should be allowed to intervene because:

a. The summonses should not be enforced due to the admissions of the IRS that the IRS was conducting only a criminal investigation and using the administrative summonses after the search warrant solely to gather evidence for a criminal prosecution. The civil aspects had been abandoned by admission. Other conduct such as the institution of a legal action to get a search warrant under the Federal Rules of Criminal Rules and the voluntary allowance of the statute of limitations on the assessment to run, and the fact that the issuing agent is a criminal tax investigator are additional indica.

b. Even if the above were not true the records [sic] is clear that the IRS has been using administrative civil process to gather evidence intimately connected with the fruits of the search warrant. Under the Zack case, this

constitutes institutional bad faith and the summonses cannot be enforced even if the warrant were valid. Moreover, on remand, Judge Foley relied on the above factor and the fact that a criminal tax investigator issued the summonses in refusing to enforce. Additional evidence is the allowance of the statute of limitations to run. (See Declaration, Exhibit 19.)

c. Clear and convincing evidence has been submitted that Revenue Agent Rivard committed fraud, deceit and trickery to obtain and maintain access to the books and records. The basis of the search warrant is tne result of the audit. We also have the troublesome issue of whether intention or reckless misrepresentations were made to the Magistrate to obtain the warrant, which by itself would vitiate the summons. We submit that the warrant has a terminal

case of fraud and is void. Accordingly, this Court should not lend its powers to enforce summonses intimately connected with the fraudulent warrant. Fraud vitiates everything it touches. See McKelvey v. McKeever, 74-1 USTC ¶9410 (D. Ariz. 1974); aff'd (January 1976, CA9 unpublished) Toscano v. Commissioner, 441 F.2d 1366 (C.A.9, 1971); U.S. v. Hole, 564 F.2d 289, (C.A. 9, 1977).

d. Clear and convincing evidence has been offered that the IRS during two audits had and continued to have access to the books and records of Midwest Growers. Also, Fleischman's affidavit did not allege that false records were not offered or records were withheld. Indeed, he admits to the contrary. The Vonder Ahe case clearly states that any search warrant used in these circumstances lacks probable cause and is an impermissible second inspection. See 508 F.2d 364, 369-370 (C.A. 9, 1974).

F.2d 364, 369-370 (C.A. 9, 1974). Accordingly, this Court should not lend its powers to enforce summonses intimately connected with the invalid warrant. In short, two wrongs do not make a right.

e. Clear and convincing evidence has been submitted that Agent Rivard completed her one visit (lasting over a period of 30 days) and so advised Midwest. She voluntarily closed out the one visit. 26 U.S.C. Sec. 7605(b) clearly has been violated here. Moreover, the 30 day visit is all that Congress intended. We quote from 61 Cong. Record, p. 5855, September 28, 1921, the legislative history of 26 U.S.C. Sec. 7605(b):

> "MR. WALSH: . . . So that up to the present time an inspector could visit the office of an individual or corporation and inspect the books as many times as he chose?

"MR. PENROSE: And he often did so.

"MR. WALSH: . . . And this provision of the Senate committee seeks to limit the inspection to one visit unless the commissioner indicates that there is necessity for further examination?

"MR. PENROSE: That is the purpose of the amendment."

(Emphasis added.)

This provision was re enacted [sic] in the Revenue Act of 1926. The one visit rule of 7605 was amended in the Senate to allow two visits. The Conference Committee refused to accept the amendment and the original one visit rule was resubstituted. See H. Rept. No. 356, 69th Cong., 1st Sess., 55.

Since 1926, the section has been re-enacted without substantial change or further discussion of legislative intent.

We submit that the law is clear, one visit to inspect per investigation. This Court is required to follow the clear legislative intent of the Congress when it legislates under its taxing powers so as to ensure fair and even administration of the tax law. See Lyeth v. Hoey, 305 U.S. 194.

f. Clear and convincing evidence has been offered that the IRS expanded the search beyond the written scope of the warrant which is limited to the scope to Offices 5 and 6. In fact, almost all the evidence was seized from other offices 5 and 6 and a private automobile. (See Exhibit 8, ¶13, Exhibit 6, ¶2, 12-14) In addition, the agents were advised that they were going beyond the scope of the warrant. (See generally, Exhibit 8, ¶¶4-6 and attached Exhibits A and B.) See also Keiningham v. U.S. 287 F.2c 126 (C.A. Dec. 1960). Hence

this Court should not enforce summonses connected with and emanting [sic] from the illegally obtained evidence.

g. Clear and concincing [sic] evidence has been offered that the IRS failed to comply with the "no knock" provisions of 18 U.S.C. Sec. 3109. Accordingly, the Court must suppress. (See Exhibit 8, ¶¶2 and 4, Exhibit 6, ¶¶3-5) U.S. v. Fluker, 543 F.2d 709 (C.A. 9, 1976).

h. The conduct and continued illegal acts depicted by this case collectively!

1. is the type of bad faith envisioned by the Powell case at 379 U.S. 58 where it states that bad faith can be any other conduct relfecting on the good faith nature of the investigation.

2. is the type of agency abuse outlined in footnotes 19, 20 at p. 19 of the Slip opinion of the La Salle Bank opinion.

i. The IRS, after getting all the corporate records under the search warrant, has delayed sending the case forward and is shown by the Declaration of Edward O. C. Ord ¶23(e) and the summons transcripts where the IRS was interrogating witnesses based on the seized records as will be done with Mr. Ford. This is expressly forbidden by the La Salle Bank case slip opinion at pp. 18-19.

The movants will also assert that the information sought is already within the possesesion of the IRS. In Powell v. U.S., 379 U.S. 48, 57-58. the [sic] Court carefully deliniated who had what burden of proof in a summons enforcement action. The burden of the IRS is "to show . . . that the information sought is not already within the Commissioner's possession . . . ."

while

X X X

The burden of showing an abuse of the Court's process is on the taxpayer. . . ." (Emphasis added.) The words "show", or demonstrate anything related to this requirement. [sic] His declaration does not even state that the information sought from the records is not already in the possession of the IRS. He states the records are not in his possession. This is not the correct criteria. Even if it were, his statements are conclusionary words. We submit that the IRS is required to give facts and explanations in a declaration; not legal conclusions in any event.

This is particularly so in the instant case. The IRS has all the books and records of Midwest, Coast Express, West Coast Systems, etc. including financial statements, bank statements, checks, and other bank records. The

Supreme Court used the word "information". Since the IRS has all the books and records, including bank records of Midwest, et al it has all the information concerning their tax liabilities already. It has not shown or explained why it needs any information from Mr. Ford in addition. Recently McCarthy summonsed [sic] the bank records of Midwest including loan applications and ledger cards. Why does it need loan applications when it has the financial records of Midwest including financial statement? [sic] The same applies to finance agreements. With respect to the ledger cards on request, the bank can supply blank ledger cards. Why does it need the specific ledger cards? This is simply further evidence.

In short, the IRS has failed to show that the information sought from the summoned records is not already within

the possession of the IRS. Accordingly, the petition is subject to dismissal.

The intervenors argued that the IRS is simply holding back the case to gather additional evidence for a criminal prosecution in violation of the La Salle Bank case. The instant summons and the bank summons are tangible evidence of this.

c. The Judicial Endorsement Of Intervention By The Ninth Circuit.

The Court of Appeals, the same day as the notice of appeal was filed in effect summarily reversed the District Court for denying some of the movants intervention. During the hearing, the Ninth Circuit expressly approved the Genser case and indicated likewise that the constitutional issues revolving around the application, issuance, and execution of the search warrant as well

as obtaining of the warrant in violation of the Vonder Ahe case and the declaration of illegal conduct and the possible criminal activity and the subsequent issuance of IRS summonses were grounds for the intervention. In light of the extraordinary action of the Court after reviewing the declarations of outraged citizens and the same intervention arguments made herein, we respectfully submit that the Court should recognize the ruling of the Court of Appeals and allow intervention.

CONCLUSION

The movants should be allowed to intervene and an appropriate order is attached.

Respectfully submitted,

E. O. C. ORD, INC.

EDWARD O. C. ORD,
Attorney for Intervenors

# Opposition

Office - Supreme Court, U.S.
FILED
JAN 29 1982
L. STEVAS.

No. 81-1074

# In the Supreme Court of the United States

OCTOBER TERM, 1981

MIDWEST GROWERS COOPERATIVE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


Page

Cases:

*Kipperman* v. *Commissioner*, 622 F. 2d 431 ..... 3

*Kurshan* v. *Riley*, 484 F. 2d 952 ..... 3

*Nadeau* v. *Helgemoe*, 581 F. 2d 275 ..... 3

*SEC* v. *Laird*, 598 F. 2d 1162 ..... 2

*Sethy* v. *Alameda County Water District*, 602 F. 2d 894 ..... 3

*United States* v. *Carpenter*, 425 F. 2d 264 ..... 3

*United States* v. *Deak-Perera International Banking Corp.*, 610 F. 2d 89 ..... 2

*United States* v. *First National Bank of Sturgis*, 587 F. 2d 909 ..... 3

*United States* v. *Kis*, 658 F. 2d 526 ..... 2

*United States* v. *Lyons*, 442 F. 2d 1144 ..... 3

Statute:

42 U.S.C. 1988 ..... 2, 3, 4

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 81-1074

MIDWEST GROWERS COOPERATIVE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

---

In this IRS summons enforcement case, petitioners seek review of the dismissal of their appeal as moot.

The pertinent facts may be summarized as follows: As part of an investigation into the income tax liability of Midwest Growers Cooperative, Special Agent Dennis P. McCarthy of the Internal Revenue Service issued a summons to James F. Ford seeking testimony concerning checks issued by Midwest Growers Cooperative and negotiated through Desert GMC, Inc., of which Ford was president. Ford refused to comply with the summons, and the United States brought this summons enforcement proceeding in the United States District Court for the District of Nevada. Petitioners moved to intervene in the summons enforcement proceeding, alleging, *inter alia*, that enforcement of the summons would be an abuse of the judicial

process and would violate their Fourth and Fifth Amendment rights, and their constitutional right to privacy (Pet. App. G-1 to G-70). The district court denied petitioners' motion to intervene (Pet. App. C-1 to C-10).

During the pendency of petitioners' appeal, the government moved for voluntary dismissal of the petition to enforce the summons. The district court granted the government's motion to dismiss, with prejudice, but awarded Ford attorney's fees and costs. Based upon the district court's actions, the government filed a suggestion of mootness in the court of appeals. Petitioners opposed that suggestion at oral argument on the ground that the issue of their right to attorney's fees remained to be settled. The court of appeals dismissed the appeal as moot holding that "[s]ince there is no longer any action in which appellants can intervene, judicial consideration of the question would be fruitless" (Pet. App. E-5). Moreover, the court of appeals determined upon the record before it, that petitioners were not "prevailing part[ies]" under 42 U.S.C. 1988, and denied their request for attorney's fees (Pet. App. E-13).

1. The court of appeals correctly dismissed petitioners' appeal as moot. Petitioners sought to intervene in an action to enforce an internal revenue summons, asserting grounds of abuse of judicial process and violation of their constitutional rights. Those assertions, which petitioners claim established their right to intervene, were reasserted in the court of appeals. However, after the government voluntarily dismissed its action to enforce the summons, the court of appeals dismissed the appeal as moot. The only issue before the court was the denial of petitioners' motion to intervene. Since there was no longer any action in which the petitioners could intervene, the case was moot and the court of appeals correctly dismissed the appeal. *United States* v. *Kis*, 658 F. 2d 526, 532-535 (7th Cir. 1981); *SEC* v. *Laird*, 598 F. 2d 1162, 1163 (9th Cir. 1979); see also *United States* v. *Deak-Perera International Banking Corp.*, 610 F. 2d 89

(2d Cir. 1979); *United States* v. *First National Bank of Sturgis*, 587 F. 2d 909 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F. 2d 952, 953 (4th Cir. 1973); *United States* v. *Lyons*, 442 F. 2d 1144 (1st Cir. 1971); *United States* v. *Carpenter*, 425 F. 2d 264 (5th Cir. 1970).

2. Petitioners further contend (Pet. 17-24) that the court of appeals improperly denied them an award of attorney's fees pursuant to 42 U.S.C. 1988. That statute provides for reasonable allowance of attorney's fees to a "party" prevailing against the United States in any civil action or proceeding instituted by the government to enforce, or charging a violation of, a provision of the Internal Revenue Code. The purpose of the statute is to reimburse those who are sued by the government and made unwilling defendants, but who later prevail. A "prevailing party" for these purposes is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit [that he] sought in bringing suit." *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278-279 (1st Cir. 1978); see also *Sethy* v. *Alameda County Water District*, 602 F. 2d 894, 897-898 (9th Cir. 1979).

Here, petitioners were denied leave to intervene in the summons enforcement proceeding. They accordingly never became parties to the summons enforcement suit. Moreover, petitioners were not defendants in an action brought by the government, as the statute requires. See *Kipperman* v. *Commissioner*, 622 F. 2d 431 (9th Cir. 1980). As a result, there is no basis to their claim for an award of attorney's fees since they had no role in this case other than that of volunteers. The court of appeals therefore correctly held (Pet. App. E-13) that the statute was "not meant to reimburse volunteers for expenses incurred in aiding named parties or those who actively, but unsuccessfully, seek to become parties, for expenses incurred in their attempt to become parties." Petitioners were not parties, much less "prevailing

parties," within the meaning of 42 U.S.C. 1988. The court of appeals therefore properly rejected their request for attorney's fees.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

JANUARY 1982

DOJ-1982-01